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THE FINAL OUTCOME OF THE FISHERIES ARBITRATION

On the 15th of November, 1912, the United States and Great Britain formally ratified and put into effect an agreement¹ which, in consequence of diplomatic negotiations covering nearly two years, had been signed by their plenipotentiaries on the 20th of July, 1912, adopting with certain modifications the rules and method of procedure embodied in the award of the North Atlantic Coast Fisheries Arbitration Tribunal, rendered at The Hague on September 7, 1910, under which all questions hereafter arising in regard to the exercise of American fishing liberties under the treaty of 1818 may be determined in accordance with the principles laid down in the award. This agreement constitutes the final step which was necessary to complete and perfect the arbitration award and give it practical application; and the award and this agreement together establish for all time the extent of the rights and obligations of the inhabitants of the United States in the exercise of their fishing liberties under the treaty of 1818.

The time has come, therefore, when it is possible to review this arbitration as a completed transaction and measure the value of the results secured in the light of its ultimate outcome as finally settled by this agreement.

This arbitration was in some respects the most notable of the many international arbitrations in which the United States has participated. The fisheries dispute, the settlement of which was its purpose, had been a constant source of irritation and friction between the United States and Great Britain for nearly a century, and on several occasions had seriously strained the friendly relations between the two countries. Throughout the course of this dispute both countries exhausted every resource of diplomacy, short of arbitration, in attempting to bring about a satisfactory adjustment of the questions at issue, but without success. It was, therefore, a surprising and encouraging triumph for the cause

¹ This agreement is printed in the Supplement to this JOURNAL, page 41.

of arbitration in the settlement of international disputes, that, when at last arbitration was resorted to in this case, a result was secured which has been accepted on both sides as an eminently fair and satisfactory settlement of the controversy.

It is true that neither side secured all that it contended for, and perhaps hoped for, but that probably is inevitable in such an arbitration, and in considering the case now, after two years have elapsed since the award, it may fairly be said that if we have any cause for regret on our side of the line, it is only because it was found necessary to call in foreign arbitrators to settle our differences with Canada and Newfoundland.

For a clear understanding of the questions involved in this controversy, a brief examination of its origin and historical development is necessary.

At the close of the Revolution, the United States and Great Britain entered into their treaty of peace of 1783, by the third article of which the rights of the United States, as an independent nation, in the fisheries in the waters of the North Atlantic outside of the territorial waters of Great Britain were recognized, and special liberties of taking, drying, and curing fish on the shores and coastal waters within the jurisdiction of Great Britain were secured to the inhabitants of the United States.

No question arose as to the meaning and effect of the provisions of this treaty until the close of the War of 1812 when, in the negotiations for the treaty of peace at Ghent in 1814, the British Commissioners informed the Commissioners of the United States that in so far as the fisheries provisions of the treaty of 1783 related to the inshore or coast fisheries, Great Britain regarded them as abrogated by that war. No question was then, or thereafter, raised as to the rights of the United States in the fisheries outside of British territorial waters, but formal notice was given "that the British Government did not intend to grant to the United States gratuitously the privileges granted by the former treaty of fishing within the limits of the British Sovereignty and of using the shores of the British territories for purposes connected with the fisheries." The Commissioners of the United States, on the other hand, contended that inasmuch as these fisheries provisions of the treaty of 1783 merely secured to the United States the continued enjoyment of

preexisting rights upon the partition of the British North American empire at the close of the Revolution, such provisions were not subject to abrogation by war, and that no declaration or provision in the new treaty was required to continue in force these provisions of the old treaty.

The positions thus taken were maintained by each side without change throughout the negotiations, with the result that no mention of the fisheries was made in the Treaty of Ghent as finally signed in 1814; and the question of whether or not the United States was entitled to the continued enjoyment of these fishing liberties was left open for future discussion between the two governments. This question almost immediately became the subject of diplomatic correspondence which led to negotiations in 1816 between the two governments for the purpose of reaching, if possible, a mutually advantageous basis of settlement. These negotiations, after many interruptions and delays, were finally brought to a successful conclusion on October 20, 1818, when a new treaty was signed dealing with the fisheries and several other matters of difference between the two governments. By this treaty the United States secured for its inhabitants the liberty "in common with British subjects" of taking, drying and curing fish on certain defined portions of the coasts of Canada and Newfoundland, including the coast of Labrador; and the United States renounced for its inhabitants the liberty theretofore enjoyed of taking, drying and curing fish "on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's Dominions in America" not included within the defined limits. It was provided, however, that American fishermen should be admitted to enter such bays or harbors for the purposes of shelter, repairing damages, purchasing wood and obtaining water, but for no other purpose whatever, and that they should be under such restrictions as were necessary to prevent their taking, drying or curing fish therein, or in any manner whatever abusing the privileges thus reserved.

This new treaty superseded the fisheries provisions of the earlier treaty which Great Britain had asserted were abrogated by the War of 1812, and thus set at rest that discussion. Unfortunately, however, although thus disposing of the existing causes of dispute between the

two countries, the fisheries provisions of this treaty contained new and unexpected causes of difference which, as the event has proved, were destined to vex the friendly relations between Great Britain and the United States for nearly a century.

Several of the less important questions which arose during the course of the controversy were disposed of by diplomatic discussion, and all the other differences which remained unsettled are covered by the several questions submitted for decision in this arbitration, and can more conveniently be considered in connection with the effect and meaning of the award, which is examined below. For the present it is sufficient to state that the differences as to the meaning of this treaty have brought into question not only the rights and duties of the American fishermen in the territorial waters of Great Britain affected by the treaty, but also the limitations of British sovereignty in such waters and the extent of the treaty waters themselves; and there has hardly been a time since this controversy began when some of these questions have not been the subject of diplomatic discussion between the two governments.

Attempts were made to compose these differences by arranging in the Reciprocity Treaty of 1854 and the Treaty of Washington of 1871 for new and more extensive fisheries privileges for American fishermen in the territorial waters of Canada and Newfoundland in exchange for trade and other concessions granted by the United States to those Colonies. Both of these arrangements, however, served only a temporary purpose, and neither of them proved satisfactory to the United States. Another attempt to end this controversy was made in 1888 when the so-called Bayard-Chamberlain Treaty was negotiated defining the rights and obligations of American fishermen in British territorial waters, but this treaty failed to secure the approval of the United States Senate and never became effective. Again in 1892 the so-called Blaine-Bond Treaty was negotiated adjusting the differences between the United States and Newfoundland, but this treaty was not ratified on account of opposition on the part of Canada, and a similar treaty negotiated in 1902, known as the Hay-Bond Treaty, was finally rejected by the United States in 1905.

With the rejection of this treaty the fisheries controversy, which

had been temporarily quiescent, broke out again with renewed vigor. The failure of the United States to ratify this treaty was regarded by the Newfoundland Government as sufficient justification for terminating all the commercial privileges which had always theretofore been extended to American fishing vessels, both on the treaty coasts and on the other coasts of Newfoundland; and this new policy was adopted with the avowed purpose of compelling the United States to admit Newfoundland fish and fish products to the American markets free of duty, in exchange for enlarged trading and fishing rights on the Newfoundland coasts.

In carrying out this new policy the Newfoundland Government also undertook to impose certain limitations and restrictions upon the exercise by the American fishermen of their treaty liberties in Newfoundland waters, which the United States regarded as in conflict with their rights under the treaty.

Such briefly, was the situation with which Mr. Root was called upon to deal when he became Secretary of State in the latter part of the year 1905.

An examination of the history of this controversy and the uniform failure of every previous attempt to settle it by submerging the disputed rights of the old treaty in enlarged fishing privileges exchanged for tariff concessions to Newfoundland and Canada, convinced Mr. Root that before a permanent settlement could be effected the respective rights of the parties under the treaty of 1818 must first be determined. He, therefore, proceeded at once to enter upon negotiations with Great Britain for the purpose of defining the fishing rights of American fishermen under the treaty, and restraining the Colonial Governments from interfering therewith. It soon became evident in the diplomatic discussion which ensued that, on account of the wide divergence of view between the two governments as to the true intent and meaning of the treaty provisions, it would be impossible to reach an agreement upon a common basis for a permanent adjustment of all the questions in dispute; and it was recognized on both sides that recourse must be had to arbitration. Accordingly, pursuant to the provisions of the general arbitration treaty of April 4, 1908 between the United States and Great Britain, which meanwhile had been entered into, a special agreement

for the arbitration of this controversy was concluded on January 27, 1909. By this agreement seven questions, covering all the unsettled matters of difference growing out of the fisheries provisions of the treaty of 1818, were referred for decision to a tribunal of arbitration constituted in accordance with the provisions of The Hague Convention of October 18, 1907 for the pacific settlement of international disputes, and special provisions were adopted governing the procedure before the Tribunal and providing an expeditious and effective method of giving practical effect to the award of the Tribunal, and of determining any new questions which might arise in the future as to the meaning of the award, or of the fisheries provisions of the treaty of 1818.

The Tribunal consisted of five members² who were selected by common accord between the United States and Great Britain from the members of the Permanent Hague Court. As is customary in such cases, each government was represented by an agent.³ The agent in international proceedings acts for and stands in the place of his government before the Tribunal, and is responsible for the preparation and presentation of the case on his side, having general control over the proceedings on behalf of his government before the Tribunal, with all the necessary authority which such responsibilities entail. In addition to the agents, each government was represented by counsel,⁴ six appear-

² Mr. H. Lammesch, Doctor of Law, Professor of the University of Vienna, Aulic Councillor, Member of the Upper House of the Austrian Parliament; His Excellency Jonkheer A. F. de Savornin Lohman, Doctor of Law, Minister of State, former Minister of the Interior, Member of the Second Chamber of the Netherlands; Honorable George Gray, Doctor of Law, formerly United States Senator, Judge of the United States Circuit Court of Appeals; The Right Honorable Sir Charles Fitzpatrick, Doctor of Law, Chief Justice of Canada; Honorable Luis Maria Drago, Doctor of Law, former Minister of Foreign Affairs of the Argentine Republic, Member of the Law Academy of the University of Buenos Aires.

³ Honorable Chandler P. Anderson, Agent for the United States; The Honorable Allen B. Aylesworth, Minister of Justice of Canada, Agent for Great Britain.

⁴ Counsel for the United States: Honorable Elihu Root, Honorable George Turner, Honorable Samuel J. Elder, Charles B. Warren, Esquire, James Brown Scott, Esquire, and Robert Lansing, Esquire.

Counsel for Great Britain: The Right Honorable Sir William Snowdon Robson, Attorney General of Great Britain; The Right Honorable Sir Robert Bannatyne Finlay, former Attorney General for Great Britain; The Honorable Sir Edward P. Morris, Prime Minister of Newfoundland; The Honorable Donald Morrison, Minister

ing on behalf of the United States, and seventeen on behalf of the British and Colonial Governments.

The questions submitted for decision all called for an interpretation of the fisheries provisions of the treaty of 1818, and involved an examination not only of the language of that treaty, but also of the events leading up to it, and the subsequent governmental actions on each side bearing on its interpretation. The discussion of these questions, therefore, required the compilation and presentation of all the material and pertinent evidence available showing the history of the American fishing rights in British waters from colonial days down to the present time, covering a period of more than one hundred and twenty-five years. This evidence comprised the diplomatic correspondence between the United States and Great Britain and the British Colonial correspondence bearing upon these questions, also all legislative and executive acts on both sides pertinent to the issues, together with all records, so far as they were available and material, of the negotiations leading up to, as well as the language of the treaties of 1783, 1814, 1818, 1854, 1871 and the unratified treaties of 1888, 1890 and 1902, and the *modus vivendi* relating to the fisheries entered into in 1885, and the subsequent ones of 1888, 1906, 1907 and 1908 respectively, and also a number of treaties between Great Britain and France, and the United States and France, in so far as they had a bearing upon the interpretation of the treaty of 1818.

Before the meeting of the Tribunal, the agent of each government delivered to the other and to the members of the Tribunal a printed case presenting the evidence relied upon, and the conclusions drawn from it in support of the contentions of his government; and printed counter-cases in reply were also served, followed by printed arguments on the law, with citations of authorities and precedents.

The Tribunal met on June first at The Hague to hear the oral arguments, which were presented by four counsel on each side, Great Britain taking the opening, and the United States the closing argument, in

of Justice of Newfoundland; Sir James S. Winter, former Attorney General of Newfoundland; Mr. John S. Ewart, Mr. George F. Shepley, Sir H. Erle Richards, Mr. A. F. Peterson, Mr. W. N. Tilley, Mr. Raymond Asquith, Mr. Geoffrey Lawrence, Mr. Hamar Greenwood, Messrs. Blake and Redden, Mr. H. E. Dale.

accordance with an arrangement entered into by the agents and counsel. These arguments extended over a period of nine weeks from June 6th to August 12th, consuming forty sessions of the Tribunal. On September 7th, within less than a month after the close of the oral argument, the Tribunal announced its award.

The first question submitted for decision called upon the Tribunal to determine to what extent, if at all, the British or Colonial Governments were entitled, without the consent of the United States, to limit or restrain the time, methods, or implements of fishing by American fishermen exercising their treaty liberties in British territorial waters. Great Britain had already admitted, in the negotiations which resulted in this arbitration, that no such limitations could be imposed unless they were appropriate and necessary for the protection and preservation of the fisheries, and reasonable in themselves, and fair as between British and American fishermen. This admission was incorporated in the question as submitted for decision, and to that extent the contentions of both governments coincided. But the question of the enforcement against American fishermen of fishing regulations objected to by the United States as not appropriate, necessary, reasonable, or fair, remained to be determined. The importance of this question to the United States was due to the fact that, owing to the competition between the American fishermen and certain Newfoundland local interests, the Newfoundland Government was attempting to enforce a number of fishing regulations, some of which, although in form applying to all fishermen alike, in fact applied only to American fishermen and constituted a very serious discrimination against them, and all of which were regarded by the United States as unreasonable and unnecessary.

The clause of the treaty which gave rise to this feature of the controversy provided merely that "the inhabitants of the United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind" on the so-called treaty coasts. The British contention rested on the argument that the words "in common with the subjects of His Britannic Majesty" meant that American fishermen should be on exactly the same footing as local fishermen in British waters, and therefore subject to the same governmental control exercised by Great Britain and her Colonies over British subjects.

The United States, on the other hand, showed by the negotiations resulting in that treaty, as well as by means of the antecedent French fishing treaty rights on the Newfoundland coast, that the words "in common" were used to negative the implication, which otherwise would have arisen, that American fishermen were to have an exclusive right of fishing. The United States further maintained that, instead of subjecting American fishermen to local regulations, the effect of the treaty was either to establish a fishery common to both nations, in which the United States had an equal interest with Great Britain, thus creating an international servitude depriving Great Britain of a portion of her sovereignty in the treaty waters, or else, in the alternative, that the treaty must be regarded as imposing upon Great Britain a contractual obligation limiting the exercise of British sovereignty in treaty waters, to the extent that the prerequisite of reasonableness must be determined before regulations could be enforced against American fishermen, and that neither Great Britain nor her Colonies could be the sole judge of the question of reasonableness.

Much to the satisfaction of Great Britain, the Tribunal did not support the extreme contention of the United States that Great Britain had transferred to the United States sovereign rights in the treaty waters; but, equally to the satisfaction of the United States, the Tribunal further decided that, although British sovereignty in such waters remained intact, yet a limitation had been imposed upon the exercise of such sovereignty to the extent claimed by the United States, so that in case of any dispute as to the reasonableness of regulations their enforcement against American fishermen must be suspended until they were held to be reasonable, as defined in the award, by an impartial tribunal in accordance with certain rules and a method of procedure which were embodied in the award and recommended by the Tribunal for the adoption of the two governments. The British Government objected strongly to some of these rules as an unnecessary limitation upon British sovereignty, and took the position that although they were embodied in the award, they did not form part of it, and were not binding upon the two governments, being merely in the form of recommendations for their adoption, and that it was open to the two governments to reject them altogether, or adopt them with modifications. As a result of protracted

negotiations, it finally appeared that Great Britain was willing to agree to the rules and method of procedure recommended by the Tribunal, if modified so that instead of suspending the operation of the Canadian and Newfoundland laws pending the determination of their reasonableness by an impartial tribunal, the Canadian and Newfoundland Governments should be required to adopt regulations, relating to the fisheries in Canadian and Newfoundland waters, at least six months before the opening of the next fishing season when the laws were intended to go into effect. The reason for fixing six months as a minimum period was to give sufficient time before its expiration within which the question of the reasonableness of any fisheries regulations which were objected to might be submitted to and decided by a permanent mixed fishery commission established by the two governments pursuant to the award recommendations. This modification, together with certain other modifications which were desired by the United States, were finally agreed to, and the rules and method of procedure recommended in the award, with these modifications, have now been adopted by both countries in their agreement of July 20, 1912. These amended rules and method of procedure are based upon the decision of the Tribunal that neither the United States nor Great Britain, nor her Colonies, can be the sole judge of the reasonableness of fisheries regulations in treaty waters and they fulfil, quite as effectively as the rules originally recommended by the award would have fulfilled, the requirement of the award that the United States shall hereafter have an opportunity of having any dispute as to the reasonableness of fisheries regulations determined by an impartial tribunal before such regulations are imposed upon American fishermen exercising their treaty liberties.

In order to give the award practical application to existing regulations, and in accordance with a special provision for that purpose made in the arbitration agreement, the question of the reasonableness of all existing Canadian and Newfoundland regulations, to which the United States had previously objected, was referred by the Tribunal, at the request of the United States, to a commission of expert specialists on the ground that the determination of their reasonableness required an examination of their effect in actual operation, and expert information about the fisheries themselves. By the agreement of July 20, 1912, the jurisdic-

tion thus conferred upon the commission of expert specialists was transferred to the Permanent Mixed Fisheries Commissions established in accordance with the award recommendations, so that now this commission has authority to pass upon the reasonableness not only of fisheries regulations hereafter adopted, but also of all existing fisheries regulations which the United States has objected to as unreasonable.

Such, in general, were the results which have been secured as the outcome of this arbitration in relation to the issues presented by the first question, and it will be perceived that very substantial advantages have been gained by the United States. Under the conditions previously existing, the United States was at a considerable disadvantage because the Newfoundland and Canadian Governments were in a position to enforce the disputed fishing regulations in British waters and seize and confiscate American vessels for violating them, while the United States, on the other hand, had no alternative but forcible intervention, which was out of the question, or renewed diplomatic remonstrance and argument, which had already proved to be futile. Now, however, before any fishing regulation can be enforced against American fishermen in treaty waters, the United States has the right to have the question of their reasonableness within the meaning of the award submitted to and decided by an impartial tribunal; and henceforth American fishermen will know before the beginning of each season just what fisheries regulations will be in force for that season, thus putting an end to the practice, which has heretofore prevailed upon the treaty coast, of imposing on short notice, or without any notice at all to the American fishermen, new regulations which were prejudicial and embarrassing to their fishing operations.

The results thus secured would have been accepted by the United States as a satisfactory settlement of this question at any time during the history of the controversy, almost every Secretary of State who had occasion to discuss this question having expressed a willingness that American fishermen on the treaty coasts should be subject to just and reasonable fishery regulations, the determination, however, of the justness and reasonableness of such regulations not being left solely to Great Britain or her Colonies.

The sixth question ranked next to the first in importance. This ques-

tion was introduced into the arbitration by Newfoundland, and was of recent origin. It called upon the Tribunal to determine whether or not the American fishermen were entitled under the treaty to fish in the bays on the Magdalen Island and on the southern and western coasts of Newfoundland, which formed part of the so-called treaty coasts. The Newfoundland contention that the treaty right of fishing did not extend to such bays rested on the ground that bays were expressly mentioned in the treaty as part of the Labrador treaty coast, and were not expressly mentioned in the treaty as forming part of the treaty coast of Newfoundland and the Magdalen Island, except as to drying and curing fish in the bays on the southern treaty coast of Newfoundland. The United States contended, on the other hand, that the right to fish in these bays was included in the right to fish on these coasts generally, and that this was shown to be the intentions of the parties by the language of the treaty, and by the negotiations leading up to it, and by usage and custom, the actions of both governments in that regard having uniformly so interpreted the treaty in actual practice ever since it was entered into. The Tribunal in its award overruled the contention of Great Britain on this question and sustained in all respects the contention of the United States.

The peculiar importance of this question was due to the fact that if the Tribunal had decided that American fishermen were not at liberty to fish in the bays referred to, they would have been wholly debarred from the winter herring fisheries, and deprived of the most important source of supply of bait fishes necessary for the successful prosecution of the immensely valuable fisheries of the Grand Banks and other banks in the North Atlantic; and the Newfoundland Government would have been very much strengthened in its policy of exacting commercial concession from the United States in exchange for granting the privilege of procuring bait fish. This question also involved a large pecuniary indemnity which Newfoundland was preparing to claim against the United States for the value of all the fish taken in these bays by American fishermen during the past ninety years, which claim was disposed of by the award of the Tribunal.

The fifth question called upon the Tribunal to determine whether the clause of the treaty by which the United States renounced the right

to fish on or within three marine miles of any of the bays of His Britannic Majesty's Dominions in North America, applied to all indentations of the non-treaty coasts, regardless of the size and shape of such indentations, which was the British contention, or applied only to such indentations of the coast as were within the three mile limit of jurisdiction measured seaward from the shore, which was the contention of the United States. The question of the meaning of the word "bays" in the renunciatory clause arose very early in the history of the controversy. It was then asserted on the part of Great Britain that any headlands on the coast, no matter how far apart, formed a bay, and that the line from which the three mile limit of exclusion extended seaward must be drawn between such headlands. This contention was supported by the notorious opinion of the Law Officers of the Crown, rendered in 1841, in which they erroneously assumed that the word "headlands" appeared in the treaty, and that its use there justified this interpretation. The view has been expressed by many who have written on the fisheries dispute that this controversy as to bays could easily have been settled, and probably would never have become serious, if it had not been for the acquiescence of Great Britain in this inexplicable blunder on the part of the Law Officers of the Crown.

On this question the Tribunal decided that the word "bays" meant only those indentations which had the configuration and characteristics of a bay, taking the word in its geographical sense. They did not decide, however, that Great Britain had territorial jurisdiction over the waters of the large bays beyond the usual distance of three miles from the shore. It is expressly stated in the award on this question that "the Tribunal is unable to understand the term 'bays' in other than its geographical sense," and also that "though a state cannot grant rights on the high seas, it certainly can abandon the exercise of its right to fish on the high seas within certain definite limits." It is evident, therefore, that the effect of the award on this question is merely to impose upon the United States an obligation under the treaty to prevent American fishermen from fishing anywhere in the large bays, but that, except when such vessels are found within three miles of the shores of such bays, they are still on the high seas and subject to American and not to British laws, and cannot be seized by British vessels. The question of

when an indentation has the characteristics of a bay was left open by the award. In order, therefore, "to render the decision more practicable and to remove the danger of future differences," the Tribunal recommended the adoption of a general rule covering all bays with exceptions as to certain enumerated bays with reference to which the line of delimitation was expressly defined, which recommendations clearly contain an expression of the Tribunal's opinion as to the meaning and application to be given its answer with reference to the bays under consideration.

These recommendations are substantially in accordance with the provisions of the unratified Bayard-Chamberlain Treaty of 1888, with several modifications favorable to the United States. It is understood that in considering the practical application of these recommendations, some questions arose between the two governments as to their effect in relation to certain of the Newfoundland bays, but as it appeared that the delimitation of the extent of the Newfoundland bays could be postponed without any practical disadvantage to American fishermen, it was not deemed advisable to delay the settlement of the other questions upon which an agreement had been reached pending the consideration of that question. The agreement of July 20, 1912, adopts the award regulations with reference to the Canadian bays, but leaves open for further consideration the delimitation of the Newfoundland bays affected by the award, and it defines the bays to which it applies as "bays contiguous to the territory of the Dominion of Canada," thus recognizing that under the award they are not British territorial waters.

It will be seen from the foregoing considerations, that the contention of neither government in regard to "bays" has been fully sustained, and the difficulties presented by this question are shown by the fact that it is the only question on which the award was not unanimous.

This question was of considerable historical interest, but of very little practical importance, because the Bay of Fundy, which is the only large bay on the non-treaty coasts in which the American fishermen have found fishing profitable in recent years, was excluded from the application of the award.

The award on the second question sustained the contention of the United States that the treaty liberty of fishing, which is secured to

the inhabitants of the United States, entitled such inhabitants to conduct their fishing operations in treaty waters by employing as members of their fishing crews persons who are not inhabitants, although such non-inhabitants derive no benefit from the treaty in their own right.

The award on the third and fourth questions determines, in accordance with the contention of the United States, that American fishermen, while enjoying their fishing liberties on the treaty coasts and while resorting to the non-treaty coasts for their treaty privileges of shelter, repairs, wood and water, cannot be subjected to the payment of light, harbor, or other dues which are not imposed upon local British fishermen, and cannot be required to enter and clear at customs houses, and that the obligation they are under of identifying themselves as entitled to treaty rights would be sufficiently fulfilled by reporting their presence on the coast to some duly authorized official, if convenient opportunity is afforded, and by exhibiting, when called upon to do so, the credentials of their national character.

The decision of the seventh question was also in favor of the United States, the award holding that the inhabitants of the United States, whose vessels resort to the treaty coast for the purpose of exercising their treaty liberties, are entitled to have for those vessels when duly authorized by the United States in that behalf, the commercial privileges which are accorded by agreement or otherwise to United States trading vessels generally, provided that the treaty liberty of fishing and the commercial privileges are not exercised concurrently.

The results thus secured, as already stated, have been accepted on both sides as a fair and satisfactory settlement of the fisheries controversy, not perhaps with respect to each detail but taken as a whole. This unexpectedly harmonious outcome is doubtless due to the fact that in this arbitration, for the first time in the history of the controversy, an opportunity was afforded for a comprehensive and impartial presentation and examination of all the material and pertinent evidence produced on both sides bearing upon the true intent and meaning of the treaty provisions. None of the diplomatic discussions in the past have dealt with all of these questions together, and it was inevitable in a controversy extending back over so many years that both sides should not have had a common understanding of all the facts out of which the questions at

issue arose. It is quite probable that if before this arbitration both parties had been in full possession of all the facts as they have been developed and presented upon this arbitration, an agreement could have been reached without recourse to arbitration. The importance of reaching a common basis of fact in the discussion of international disputes, before submitting such disputes to arbitration, is not always appreciated, and resort might be had more frequently with advantage to the hitherto somewhat neglected expedient of employing an impartial commission of inquiry for the purpose of securing an agreed statement of facts as a basis for reaching, if possible, an adjustment by direct negotiation between the parties, rather than by arbitration.

CHANDLER P. ANDERSON.

THE PANAMA CANAL ACT AND THE BRITISH PROTEST

The Panama Canal project has its roots deep in the past. The diplomatic complications presented by the enterprise have been as difficult to overcome as the engineering obstacles. Now that the dream of ages is about to become a reality, certain of our newspapers, impressed with the magnitude of the task which the United States has undertaken and carried well-nigh to completion, are asking impatiently, what rights has Great Britain in the canal, why should she venture to dictate what use we shall make of our own property? Merely to say that England has rights under the Hay-Pauncefote treaty does not appear to satisfy these critics. They ask again, why did the United States ever give England any voice at all in the matter? In order to answer this question we have to go back to the middle of the last century when the Clayton-Bulwer treaty was negotiated and see what the relative positions of the United States and England with respect to the isthmus were at that time.

The acquisition of California in 1848 and the rush to the gold fields the following year first made the isthmian canal project a live issue. The great transcontinental railroads which fifteen or twenty years later established direct overland communication with the Pacific coast were then scarcely thought of. American engineers at that time and for years afterwards considered the Nicaragua route the most feasible one for an interoceanic canal, but England held Greytown, the Atlantic terminus of that route, as well as a protectorate over the Mosquito Coast. In view of this fact and of Great Britain's naval supremacy in the West Indies, it was evident that the United States could take no step in the construction of a canal without arriving at an understanding with the British Government. Under these circumstances the Clayton-Bulwer treaty was negotiated and in due course ratified by the Senate. Besides pledging each to the other never to obtain or maintain exclusive control over the canal, never to erect or maintain fortifications commanding the same or in the vicinity thereof, never to colonize or exercise

dominion over any part of Central America, the two contracting parties agreed that the canal should be neutralized in the event of war between them, that other nations should be invited to accede to the treaty, and that the general principle established in this treaty should apply not only to the Nicaragua route but also to the Panama or any other route that might be adopted. Thus it will be seen that Great Britain gave up Greytown, her protectorate over the Mosquito Coast, and the right to acquire territory in Central America, and received in return an equal voice with the United States in the control of any canal that might be built through the isthmus at any point. The treaty was criticised at the time as a violation of the Monroe Doctrine, but when we consider the relative positions of the two Powers and the check which the treaty placed on the extension of British influence in Central America, such criticism does not appear to be well founded.

Thirty years later, stirred by the French operations at Panama, President Hayes declared in a special message of March 8, 1880, that it was "the right and the duty of the United States to assert and maintain such supervision and authority over any interoceanic canal across the isthmus" as would protect the national interests and that the canal would be "virtually a part of the coast-line of the United States." This was intended to apply to a canal constructed by French capital. The following year Mr. Blaine, as Secretary of State, undertook to get England to acquiesce in the new policy, and argued at length that the Clayton-Bulwer treaty had been practically superseded by the changed relations of the two Powers, meaning the increased prestige of the United States on this continent, and was no longer binding. His successor, Mr. Frelinghuysen, went a step further and declared the treaty "voidable at the pleasure of the United States." He did not, however, venture to declare it "void." The British Government met these arguments by stating quietly that it would adhere to its rights under the treaty, intimating that if the treaty were abrogated England would put herself in the same position which she occupied prior to its negotiation.

Later, Mr. Olney, in a review of the situation, declared: "Upon every principle which governs the relations to each other, either of nations or of individuals, the United States is completely estopped from denying that the treaty is in full force and vigor. If changed conditions now

make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter." It was precisely in this spirit that Mr. Hay negotiated with Lord Paunccefote in 1900 a new treaty.

The first draft of the Hay-Paunccefote treaty was considered objectionable by the Senate because it still recognized England's joint responsibility with the United States for the neutralization of the canal, including the regulation of traffic, and provided for the adherence of other Powers. The Senate, therefore, amended the treaty, but in such a way that the British Government refused to accept the amendments. After the lapse of a year a second draft, meeting in the main the views of the Senate, was formulated by Mr. Hay and Lord Paunccefote and finally ratified by the Senate, December 16, 1901. This treaty is still in force. Article I expressly abrogated the Clayton-Bulwer treaty. Article II provided that the canal might be constructed by the United States directly or under its auspices and that it should be under its exclusive management. In Article III the United States agreed to adopt as "the basis of neutralization" substantially the rules of the Constantinople Convention of 1888 for the free navigation of the Suez canal. These rules as modified are stated in the treaty under six heads, the first declaring that "The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable." The remaining rules forbid the blockade of the canal, regulate the passage of war vessels, prizes, troops and munitions of war, and forbid any acts calculated to injure the canal or impair in any way its operation.

"These rules," said Secretary Hay in a memorandum prepared for the Senate Committee on Foreign Relations, "are adopted in the treaty with Great Britain as a consideration for getting rid of the Clayton-Bulwer treaty, and the only way in which other nations are bound by them is that they must comply with them if they would use the canal."

President Roosevelt, in a message to Congress of January 4, 1904, said of this treaty: "In order that no obstacle might stand in our way, Great Britain renounced important rights under the Clayton-Bulwer treaty and agreed to its abrogation, receiving in return nothing but our honorable pledge to build the canal and protect it as an open highway."

In the message just quoted President Roosevelt was undertaking to defend his course in acquiring the Canal Zone, and his main ground of justification was that Colombia was not entitled "to bar the transit of the world's traffic across the isthmus," and that he was acting for the world at large. To quote his exact words: "I confidently maintain that the recognition of the Republic of Panama was an act justified by the interests of collective civilization. If ever a government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded in the interest of mankind, the United States holds that position with regard to the interoceanic canal." Waiving all discussion of the question as to whether President Roosevelt in the rôle of agent of collective civilization was justified in his hasty recognition of the Panama Republic, it cannot be denied that the American people entered upon the construction of the canal with the idea that they were undertaking a great work for the benefit of the world at large. With the successful prosecution of the work, however, public opinion has to a large extent outgrown this idea of "a mandate from civilization," and now the canal is regarded primarily as a military asset to be used as a naval base, and secondarily as a commercial asset to be used in overcoming foreign competition in the upbuilding of our merchant marine.

Great Britain has fully conceded our right to adopt measures for the defense of the canal. This interpretation of the treaty was acquiesced in by Lord Lansdowne during the negotiation of the treaty in a memorandum dated August 3, 1901, and in the recent British protest we find the following statement on this point: "Now that the United States has become the practical sovereign of the canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection." Great Britain has, therefore, released us from all the restraints on our action imposed by the Clayton-Bulwer treaty and fully recognizes the canal as our property, subject, however, to the pledge

that, — "The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

The Panama Canal Act of August 24, 1912, exempts from the payment of tolls American ships engaged in the coastwise trade. Against this exemption the British Government formally protests in a note presented to Secretary Knox by Ambassador Bryce on December 9, 1912. Sir Edward Grey, the author of this note, claims that the Panama Canal Act violates the Hay-Pauncefote treaty in two particulars: (1) in assuming that the words "all nations" in the rule quoted above mean "all *other* nations," and (2) in ignoring the pledge that the "conditions and charges of traffic shall be just and equitable." It is expressly stated in the preamble of the Hay-Pauncefote treaty that the general principle of neutralization established in Article VIII of the Clayton-Bulwer treaty is retained unimpaired. The article referred to reads as follows:

The governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the isthmus which connects North and South America; and especially to the inter-oceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid governments shall approve of, as just and equitable; and that the same canals or railways, *being open to the citizens or subjects of the United States and Great Britain on equal terms*, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

Sir Edward Grey says: "A study of the language of Article VIII shows that the word 'neutralization' in the preamble of the later treaty is not

there confined to belligerent operations, but refers to the system of equal rights for which Article VIII provides."

The claim that the Panama Canal Act violates the provision that the charges shall be "just and equitable" is set forth thus: "Unless the whole volume of shipping which passes through the canal, and which all benefits equally by the services, is taken into account, there are no means of determining whether the tolls chargeable upon a vessel represent that vessel's fair proportion of the current expenditure properly chargeable against the canal, that is to say, interest on the capital expended in the construction and the cost of operation and maintenance."

In the foregoing pages the attempt has been merely to give the historic setting of the controversy and to make clear the points at issue. Here is a treaty, — a formal contract between two friendly nations who have many interests in common, — and no one can deny its binding force, that is to say, our legal and moral obligation faithfully to observe its stipulations. The United States has given official interpretation to one of its provisions, as we had a perfect right to do, in the Panama Canal Act. We had no intention of violating the treaty or of abrogating it. Great Britain puts a very different interpretation on the same provision, and she has the perfect right to say what she believes the treaty to mean. What are we to do? Are we to assert dogmatically that we are right and that Great Britain is wrong? Are we willing to go a step further and declare that we will fight for our contention against the nation who submitted the Alabama claims to arbitration and honorably paid the award? Ethical considerations aside, we are legally bound by the terms of our arbitration convention with England, signed in 1908, to arbitrate this dispute, if England demands it. Article I of that treaty reads:

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

The question of tolls cannot be said to affect the "vital interests, the independence, or the honor" of the country. Senator Root, who, as

Secretary of State, negotiated the arbitration treaty, declares with great emphasis that if we refuse to arbitrate the canal question "we will be in the position of the merchant who is known to all the world to be false to his promises."

The main objection raised against arbitration is that we could not get an impartial tribunal. Senator O'Gorman is quoted in the *Washington Post* of December 11 as saying: "A point that has not been sufficiently stressed is that, even if we were willing to submit to arbitration, it would be impossible to find for this case an impartial tribunal. * * * The case is nominally between the United States and Great Britain, but it would in reality be between American shipping interests and the shipping of the world." There is great misapprehension as to the organization and character of the Hague Court. Nations do not sit on that tribunal as judges, but it is composed of over a hundred jurists of international repute. When a particular case is submitted each of the parties to the suit selects one or two arbitrators from the general list or panel of the court and the two or four thus selected, as the case may be, choose another member of the general court as president. The tribunal thus created hears and decides the case. With the example of Charles Francis Adams in the Geneva Arbitration and of Lord Alverstone in the Alaskan Boundary Dispute before us, not to mention the highly honorable record of the British Admiralty Courts and of the Supreme Court of the United States in prize cases, can it be fairly maintained that we could not get an impartial hearing before the Hague Court because of the interests of other nations in the issue at stake? Is it to be supposed that international jurists of the stamp of the late Professor de Martens, of Asser, Savornin Lohman, Gram, Lammasch, and Renault, some of whom have sat on as many as four Hague tribunals, would place the shipping interests of their countries above their sense of justice and their good repute as jurists?

The United States and England are the only two parties to the Hay-Pauncefote treaty. When the agreement was being drafted the British Government proposed that Rule 1 of Article III should read as follows: "The canal shall be free and open to the vessels of commerce and of war of *all nations which shall agree to observe these rules*," but that implied the necessity of making them parties to the contract. The United

States, therefore, insisted that this clause should be changed to read thus: "The canal shall be free and open to the vessels of commerce and of war of *all nations observing these rules.*" "Thus," says Mr. Hay in his memorandum, "the whole idea of contract right in the other Powers is eliminated, and the vessels of any nation which shall refuse or fail to observe the rules adopted and prescribed may be deprived of the use of the canal."

On the face of it, the Hay-Pauncefote treaty looks like a contract for the benefit of third parties, but it is evident when one looks more closely into the circumstances of its negotiation that England was not acting in behalf of the other nations, but was merely taking extra precaution to safeguard her own interests against any possible discrimination by placing the commerce of the world on the same footing. The interest of third parties, therefore, is not a direct interest, but merely a resultant interest. They cannot be made parties to the suit.

Two methods of avoiding arbitration have been suggested in the daily press. The *Washington Post* boldly urges the abrogation of the Hay-Pauncefote treaty, on the ground that it is "a stumbling block to the United States, and a menace to the Monroe Doctrine." The excuse for such a drastic recommendation is that, "The treaty is voidable because the canal is American territory — a condition that did not subsist when the treaty was made." This point is fully covered by Article IV of the treaty, which is as follows:

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

Another suggestion, attributed by the *Literary Digest*, of December 21, to Senator McCumber, is to let the controversy hang on until June, 1913, when the arbitration treaty of 1908 expires by limitation, unless renewed. Other Senators have indignantly rejected such a suggestion, Senator Lodge declaring that "the United States would not stoop to tricks."

The real argument against arbitration is not that we cannot get a fair hearing, but that in the opinion of many of our best informed publicists we have put a wrong interpretation on the treaty and, therefore, will probably lose our case. Under these circumstances would it not be

wiser to repeal the Canal Act, or so much of it as relates to the exemption of our coastwise shipping from tolls?

Professor Emory R. Johnson, the special commissioner on Panama Canal traffic and tolls, has recently submitted an elaborate report to the Secretary of War. After an exhaustive study of the whole traffic history of the Suez, Kiel, Manchester, and Amsterdam canals, and a careful analysis of the commerce that will be attracted to the Panama Canal and the rates it can stand, he states the following conclusions:

1. In managing the Panama Canal and in fixing tolls, the usefulness of the waterway to commerce and industry should be given first consideration. The policy as regards tolls and revenue should not be allowed to limit the traffic usefulness of the waterway.

2. The Panama Canal should be made commercially self-supporting. Tolls based upon the value of the service rendered by the canal are justifiable. Those who use the waterway may justly be required to make some compensation for the benefits received. Tolls, not unduly restricting the commercial usefulness of the waterway, may be levied that will yield revenue enough to meet operation, maintenance, sanitation, government, annuity, and interest charges.

3. The same rate of toll should be charged upon American as upon foreign vessels, because (a) the omission or repayment of tolls on American shipping would be of assistance mainly to our coastwise shipping which does not need aid and would be of but little help to American vessels engaged in the foreign trade; (b) Such subsidies as are given the American merchant marine should be paid to vessels employed in our foreign trade; but the remission or repayment to vessel owners of Panama tolls on American ships in the foreign trade would be an ineffective subsidy that might invite retaliatory measures by foreign governments; (c) The exemption of coastwise shipping from Panama tolls would injure mainly to the benefit of the coastwise carriers and only partially to the benefit of shippers and consumers. Neither the rates of the steamship lines nor the charges of the rail carriers will be appreciably higher if tolls are charged on coastwise shipping than they will be if such shipping is relieved from the payment of tolls.

4. The United States should adhere to business principles in the management of the Panama Canal. The Government needs to guard its revenues carefully. Present demands on the general budget are heavy and are certain to be larger. Taxes must necessarily increase. Those who directly benefit from using the canal, rather than the general tax-payers, ought to pay the expenses of operating and carrying the Panama Canal commercially.¹

¹ E. R. Johnson, *Panama Canal Traffic and Tolls*, p. 201.

Mr. Stimson, in his annual report as Secretary of War, dated December 8, 1912, strongly endorses Professor Johnson's position. He says: "Since it is becoming constantly more apparent that the remission of tolls to our coastwise vessels will in effect amount to a payment of national funds to a special industry which does not need such assistance, I renew my suggestion * * * that such remission of tolls be not granted, and that the act be amended to that effect." President Taft has adopted Professor Johnson's recommendations as to the rates to be charged, but has not taken his advice on the subject of the coastwise trade. The question, why should we make our ships pay tolls to pass through a canal which we have built with our money, sounds very plausible, but as Professor Johnson points out, the benefit will accrue not to the American people who have built the canal, but to a small group of shipowners engaged in the coastwise trade, while the American people will have to pay for the exemption through increased taxation.

The Panama Canal Act was passed without due understanding of the questions involved. Many of our most experienced public men regard it as a mistake. Why not repeal, or modify it? We would in this way avoid the risk of an adverse decision from the Hague Court and the heavy expense incident to the suit. It is of vast importance that the world should be convinced that we intend to act in good faith in this matter. If the canal is to fill the place that we expect it to fill as a great channel for the world's commerce, then we must administer it with due regard for the interests of the world at large.

JOHN HOLLADAY LATANÉ.

NEUTRALIZATION AND EQUAL TERMS

Neutralization is the imposition by international agreement of a condition of permanent neutrality upon lands and waterways.

The author of the essay¹ of which the foregoing is the opening sentence draws the following distinction between the neutrality and the neutralization of states (p. 1):

While simple neutrality is the condition of those states which in time of war take no part in the contest, but continue pacific intercourse with the belligerents, neutralization perpetuates this condition by means of treaties effected between several powerful nations and the neutralized state.

Dr. T. J. Lawrence makes the same distinction as follows:

In ordinary neutrality are involved the two elements of abstention from taking part in an existing war and freedom to engage in it or not at pleasure. In neutralization the first element remains the same; but, instead of the second, there is imposed by international law either an obligation not to fight except in the strictest self-defense or an obligation to abstain from warlike use of certain places and things which have had the neutral character stamped upon them by convention.²

So Rivier in his *Principes du Droit des Gens*, I, 162, cited in Moore's *International Law Digest*, III, 4:

Territories or portions of territory belonging to a state other than those to which a permanent and conventional neutrality is assured, may, by an international act or in an international interest, be sheltered from acts of war. Such are said to be neutralized. This neutrality bears only on the territory, on the soil, and exercises no direct influence on the generality of rights of the sovereign territorial state, nor on the population.

¹ *Neutralization*, by Cyrus French Wicker, M. A., LL.B., B. C. L., Oxon. Henry Frowde, Oxford University Press, London, New York and Toronto, 1911.

² *A Handbook on Public International Law*, by Dr. T. J. Lawrence, Part IV, p. 140.

The contractual and international nature of neutralization is stated by Mr. Wicker as follows (p. 1):

The international relationship thus arising between a neutralized state and its guarantors is a purely contractual one. It exists neither by rules of international law nor in the agreed customs of nations, but solely in the treaties by which it is created, their purpose being to effect a relationship which shall exist permanently between all the parties concerned, requiring from the neutralized state a continuous observance of peace toward all the world and from the guarantors the recognition of that state in integrity, independence, and perpetual peace.

Referring to this international guaranty as an essential of true "neutralization," and to a frequent but inaccurate use of the term, Dr. Lawrence says:

As neutralization alters the rights and obligations of all the States affected by it, either their express consent, or the agreement of the Great Powers acting as in some sort their representatives, is necessary in order to give it validity. The word is often used in a loose and inaccurate manner to cover undertakings in abatement or mitigation of war, entered into by one or two States. We must, therefore, remember that there can be no true neutralization without the complete and permanent imposition of the neutral character by general consent. Thus Argentina and Chile could not impose an obligation on the rest of the world to refrain from warfare in the Straits of Magellan by declaring them neutralized, as they did by treaty between themselves in 1881.³

The same author, assuming that the United States would keep the Hay-Pauncefote treaty in its letter and spirit, observed (*ante motam litem*):

But an agreement between the States most directly interested may in practice amount to much the same thing, if they are powerful and determined, and covenant for the application of rules which have already received general consent in a similar case. The Treaty of 1901 between Great Britain and the United States for applying to the Panama Canal, when made, the rules of navigation now applied to the Suez Canal, is an illustration.⁴

³ *A Handbook on Public International Law*, by Dr. T. J. Lawrence, p. 141.

⁴ *Ibid.* For an instructive discussion of Neutrality and Neutralization, see Chapter XIV of Dr. Holland's *Studies in International Law*, entitled "The International Position of the Suez Canal."

Referring to the Hay-Pauncefote treaty, Mr. Wicker says (p. 80):

This treaty with England, which, however, does not amount to complete neutralization, since it is an agreement between two nations only, further provides that the Canal is to be safeguarded and maintained in neutrality by the United States alone, and consequently is a compromise between neutralization and complete American control.

In his *Manuel de Droit International Public*, 273, M. Bonfils says that the Suez Canal is not neutralized, because it is not closed to the ships of war of belligerents, but Professor Moore, who cites the passage in his *Digest of International Law*, III, 267, remarks that "the term 'neutralization' has come to be used in a sense less strict than that indicated by the author."

While Great Britain and the nations who may signify their adherence to the rules which the United States has adopted in Article III of the Hay-Pauncefote treaty for the neutralization of the canal, might not be bound in case of need to maintain the neutrality of the canal, would they not surely so do if requested by the United States? Would not their adhesion to the "rules" and the use of the canal thereunder be a virtual guaranty of its neutralization even if the United States alone could not maintain its neutrality? And would not this neutralization be in the interest of the commerce and peace of the world?

The object of the Hay-Pauncefote treaty, as declared in the preamble by both the high contracting parties, is

To facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans by whatever route may be considered expedient and to that end to remove any objection which may arise out of the convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the Government of the United States, *without impairing the "general principle" of neutralization established in Article VIII of that convention*.

The rules that "the United States adopts" are agreed to by Great Britain as a party to the treaty, and the second rule ordains that—

The Canal shall never be blockaded nor shall any right of war be exercised nor any act of hostility be committed within it.

Would not Great Britain be morally bound by this agreement to uphold that immunity from war, if occasion required? So with the other

rules. Nor is it to be forgotten that Panama has become a party to the Hay-Pauncefote treaty by its express incorporation into the treaty of November 18, 1903, between the Panaman Republic and the United States.

Instead of being guaranteed by "several powerful nations," the only guarantor of the neutrality of the Isthmus of Panama under the treaty of 1846 between the United States and New Granada (now Colombia) was the United States itself. The guaranty, with its purpose and consideration, was couched in the following terms (Article 35):

And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages, and for the favors they have acquired by the 4th, 5th, and 6th articles of this treaty, the United States guarantee, positively and efficaciously, to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory.⁵

The way in which the treaty of 1846 between the United States and New Granada combined the guaranty of Colombia's rights of sovereignty and property in the isthmus with the guaranty of the neutrality of that part of her territory is very suggestive in view of the course pursued by the United States in connection with the so-called "revolution" in Panama during Mr. Roosevelt's administration, in which Colombia was deprived of both her sovereignty and property in the isthmus.

The guaranty of 1846 put our sister republic in a somewhat anomalous condition. New Granada did not agree to remain neutral in any war that might arise in Latin-America, or elsewhere, or to refrain from waging aggressive warfare herself. Of course, she retained the right of self-defense, but she would doubtless have looked to the United States under the treaty of 1846 for protection and intervention in case of trouble with a foreign Power. Does the Panaman Republic, as the successor of Colombia on the isthmus, succeed to this guaranty of neutrality? Or is the Canal Zone, in this respect, to be distinguished from all the remain-

⁵ Malloy's *Treaties and Conventions*, Vol. I, p. 312.

ing territory of the Panaman Republic? Nothing is said on this subject in our treaty of November 18, 1903, with Panama, whose independence, however, is guaranteed by the United States, in that treaty, while the Canal Zone, of which the United States has thereby acquired "perpetual control," or rather, the canal itself, and its entrances, are neutralized by Article XVIII in the following unequivocal terms:

The canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by Section 1 of Article III of and in conformity with all the stipulations of the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.⁶

But in the proposed treaty with Colombia, which was signed on January 22, 1903, by Mr. John Hay and Mr. Thomas Herran, and shortly afterwards ratified by the Senate of the United States but subsequently rejected by the Colombian Congress, it was provided, in Article III, that

all the stipulations contained in Article 35 of the treaty of 1846-48 between the contracting parties shall continue and apply in full force to the cities of Panama and Colon and to the accessory community lands and other property within the said zone, and the territory therein shall be neutral territory and the United States shall continue to guarantee the neutrality thereof and the sovereignty of Colombia thereover, in conformity with the above mentioned Article 35 of said treaty.⁷

It was the isthmus and not merely the Canal Zone that was neutralized by the treaty of 1846 between the United States and New Granada.

Speaking in the Senate, on a bill making an appropriation for the transportation of the United States mails by railroad across the Isthmus of Panama, Mr. Webster said:

The basis of the whole, Sir, is our treaty with New Granada, which was ratified by this body and proclaimed in June, 1848. Looking to the security of a mode of communication across the continent at this Isthmus, this government took great pains to obtain the right from the government of New Granada, and by the treaty it is stipulated that whatsoever communication should be made across the Isthmus should be open to the

⁶ Malloy's *Treaties and Conventions*, Vol. II, pp. 1354-1355.

⁷ Senate Ex. K, 57th Congress, 2d Session, January 24, 1903 (injunction of secrecy removed), p. 5.

government of the United States and citizens of the United States upon as good terms as to the citizens of New Granada itself.

This government looking upon this stipulation as a benefit obtained, a boon conceded by the government of New Granada, as an equivalent for this consideration, entered, on its part, into an engagement "to protect and guarantee and defend the neutrality of *this whole Isthmus*. This will be seen by reference to the thirty-fifth article of the treaty, which will be found in the volume of the laws of the last session. It is there very distinctly stated. There is no question about it. We are under treaty obligations to maintain the neutrality of *this isthmus and the authority of the government of New Granada over it*. (V, Webster's works, 317.)

So lately as 1903, two years subsequent to the Hay-Pauncefote treaty, the United States showed its willingness to co-operate with Colombia in the administration of the canal by the following provision in the same article of the proposed treaty:

In furtherance of this last provision [Article III *supra*] there shall be created a joint commission by the Governments of Colombia and the United States that shall establish and enforce sanitary and police regulations.⁸

In view of the recent contention that the Hay-Pauncefote treaty has been made void or voidable by the alleged change in the sovereignty of the zone, under the treaty of November 18, 1903, between the United States and Panama, giving the former "perpetual control" and making it (as contended) "sovereign of the territory," it is interesting to read Article IV of the proposed treaty of January 22, 1903, with Colombia (ratified as it was by the United States Senate but rejected by the Colombian Congress):

The rights and privileges granted to the United States by the terms of this convention shall not affect the sovereignty of the Republic of Colombia over the territory within whose boundaries such rights and privileges are to be exercised.

The United States freely acknowledges and recognizes this sovereignty and disavows any intention to impair it in any way whatever or to increase its territory at the expense of Colombia or of any of the sister republics in Central or South America, but on the contrary, it desires to strengthen the power of the republics on this continent, and to promote, develop and maintain their prosperity and independence.⁹

⁸ Senate Ex. K, 57th Congress, 2d Session, January 24, 1903 (injunction of secrecy removed), p. 6.

⁹ *Ibid.*, p. 6.

Notwithstanding this recognition and reservation of the titular sovereignty of Colombia in the proposed treaty, one of the objections which led to its defeat in the Colombian Congress was that Colombia would lose its actual sovereignty in the isthmus and that the real sovereign would be the United States.

But Article IV of the Hay-Pauncefote treaty guards the neutralization of the canal and the other provisions of the treaty from any impairment by a change in the territorial sovereignty of the zone (even if it should subsequently become territory of the United States) in the following terms:

It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.¹⁰

It may be interesting and instructive at this juncture, to recall the position and utterances of the Government of the United States when the Monroe Doctrine was still in its youth, in regard to the nature of the proposed undertaking and the desirableness of inducing European governments to join in the guaranty of the neutrality of the isthmus as embodied in the treaty of 1846, either by a similar agreement with Colombia (then New Granada) or directly with the United States.

In December, 1849, Mr. Clayton, Secretary of State, instructed Mr. Foote, United States minister at Bogota, to urge upon the New Granadian Government to take measures to obtain a similar guaranty of neutrality from Great Britain.

The guaranty of Great Britain [said Mr. Clayton] is necessary for the security of the capital to be invested in the railroad and is of great and obvious importance to the United States.

At the same time, Mr. Clayton instructed Mr. Lawrence, United States minister at London, to co-operate with the New Granadian minister at that capital,

in obtaining from the British Government a guaranty of the neutrality of the Isthmus of Panama similar to that contained in Article 35 of the treaty of 1846.

¹⁰ Malloy's *Treaties and Conventions*, Vol. I, p. 783.

Mr. Lawrence was also authorized, in case he ascertained that the British Government would not enter into such a treaty with New Granada, to sound Lord Palmerston as to the disposition of his government to conclude a treaty with the United States for the same purpose.¹¹

Instructions similar to those sent to Mr. Lawrence were also sent by Mr. Clayton to Mr. Rives, our minister at Paris, January 26, 1850, with reference to possible negotiations to this end with the Government of France.

President Polk had said in his message of February 10, 1847, transmitting the treaty of 1846 to the Senate, for the advice and consent of that body, that —

it will [would] constitute no alliance for any political object but for a purely commercial purpose, in which all the navigating nations of the world have a common interest;

and he also had made the following observations, which like the remark just cited, are worthy of our remembrance and consideration to-day:

In entering into the mutual guarantees proposed by the 35th article of the treaty, neither the Government of New Granada nor that of the United States has any narrow or exclusive views. The ultimate object, as presented by the Senate of the United States in their resolution [of March 3, 1835] to which I have already referred, is *to secure to all nations the free and equal right of passage over the isthmus*.

If the United States, as the chief of the American nations, should first become a party to this guarantee [of the neutrality of the isthmus], it cannot be doubted, indeed it is confidently expected by the Government of New Granada, that similar guarantees will be given to that republic by Great Britain and France. * * * *The interests of the world at stake are so important* that the security of this passage between the two oceans can not be suffered to depend upon the wars and revolutions which may arise among different nations.¹²

This presidential message is of peculiar interest in connection with the pending discussion of the Panama Canal Act, and the protest of Great Britain against its discriminating provisions; for nations are moral persons and have a continuing personality and responsibility from one generation to another.

¹¹ Moore's *Int'l. Law Dig.*, III, p. 10.

¹² Richardson's *Presidents' Messages*, Vol. IV, pp. 511-513.

The guarantee of the sovereignty of New Granada over the isthmus [continued the President] is a natural consequence of the guarantee of its neutrality, and there does not seem to be any other practicable mode of securing the neutrality of this territory. New Granada would not consent to yield up this province in order that it might become a neutral state, and, if she should, it is not sufficiently populous or wealthy to establish and maintain an independent sovereignty. But a civil government must exist there in order to protect the works which shall be constructed. New Granada is a power which will not excite the jealousy of any nation. *If Great Britain, France, or the United States held the sovereignty over the isthmus, other nations might apprehend that in case of war the government would close up the passage against the enemy; but no such fears can ever be entertained in regard to New Granada.*¹³

Thus early it was seen that in the execution of the original plan, the neutrality of the canal involved the innocent passage of ships of war, no matter what nations might be belligerents, as was afterwards and is still the rule in the Suez Canal under the convention of October 29, 1888, between the great Powers.

During the war with Spain, the Department of State was informed by the British Foreign Office, upon an inquiry made by Mr. Hay, that the Suez Canal was open alike to American and Spanish vessels of war. Long prior to this, Lord Granville, in his note of January 7, 1882, to Mr. West, had observed:

The Navy Department of the United States must be well aware that Her Majesty's Government have never sought to bar or even to restrict the use of the canal by the naval forces of other countries, and that even during the recent war between *Russia and Turkey*, when the canal itself formed a portion of the territory of one of the belligerents, when the seat of conflict was close at hand, and when British interests might in many other respects have been nearly involved, they contented themselves with obtaining an assurance that the sphere of operations should not be extended to the canal.¹⁴

Some recent writers have contended that it is "unthinkable" that the United States should allow public vessels of a nation with whom it might be at war to pass through the canal, but taken literally, that is just what the "neutralization" provided for in the Hay-Pauncefote

¹³ Richardson's *Presidents' Messages*, Vol. IV, pp. 511-513.

¹⁴ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, p. 192.

treaty seems to mean. This appears from the six rules prescribed in Article III, and also from the declaration that these rules are substantially the same as the rules for the neutralization of the Suez Canal. While the Hay-Pauncefote treaty provides that the canal shall never be blockaded and that no right of war shall ever be exercised within it, it also seems to provide for the innocent passage of vessels of war, *flagrante bello*, even if the United States may be one of the belligerents.¹⁵ More will be said on this question later on.

The United States and Great Britain had the same conception of the neutralization of the isthmian canal when the Clayton-Bulwer treaty was negotiated, as evidenced by Article II, and they subsequently discussed the manner in which this common right of passage should be exercised in case they went to war with each other, the discussion ending in the recommendation of the following provision, on the 30th of April, 1852, to their respective governments, by Mr. Webster, who was then Secretary of State, and Mr. Crampton, the British minister at Washington:

Whereas it is stipulated by Article II of the convention between Great Britain and the United States of America, concluded at Washington on the 19th day of April, 1850, that vessels of the United States or Great Britain traversing the said canal shall, *in case of war between the contracting parties*, be exempt from blockade, detention, or capture by either of the belligerents, and that that provision should extend to such a distance from the two ends of the said canal as might thereafter be found expedient to establish; now, for the purpose of establishing such distance within which the vessels of either of said nations shall be exempt from blockade, detention, or capture by either of the belligerents, it is hereby declared that it shall extend to all waters within the distance of twenty-five nautical miles from the termination of said canal on the Pacific and on the Atlantic coasts.¹⁶

The Hay-Pauncefote treaty neutralizes "the waters adjacent to the canal within three marine miles of either end," and also provides that "a vessel of war of one belligerent shall not depart within twenty-four hours of the departure of a vessel of war of the other belligerent." The rules adopted by the United States for the neutralization of the canal

¹⁵ See the rules for the neutralization of the canal printed in the margin, *infra*, p. 37.

¹⁶ Reports of Senate Committee on Foreign Relations, 1789-1901, pp. 639, 640.

and its use by all nations on equal terms are six in number and for convenience of reference are printed in the margin.¹⁷

There were seven of these rules in the Hay-Pauncefote treaty of February 5, 1900. The first rule of the earlier treaty differed from Rule 1 of the treaty now in force in having the words "in time of war as in time of peace" follow the words "the canal shall be free and open," and in not having the words, "observing these rules," after the words "all nations." Nor did it have the words, "Such conditions and charges of

¹⁷ Article III. The United States adopts, *as the basis of the neutralization of such ship canal*, the following Rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

1. The canal shall be free and open to *the vessels of commerce and of war of all nations* observing these Rules, on terms of *entire equality*, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the services.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal. — Malloy's *Treaties and Conventions*, Vol. I, pp. 782-783.

traffic shall be just and equitable." But the provisions for the innocent use of the canal by belligerents in time of war are the same in both sets of rules. Rule 7, in the earlier treaty, expressly prohibiting fortifications, is omitted in the treaty now in force, which, however, ordains, Rule 2, that "the canal shall never be blockaded nor shall any right of war be exercised nor any act of hostility be committed within it."

In the Senate resolution which was adopted in 1835, and to which President Polk referred in his message (*supra*, p. 34), President Jackson had been respectfully requested —

to consider the expediency of opening negotiations with the governments of other nations, and particularly with the governments of Central America and New Granada, for the purpose of effectually protecting by suitable treaty negotiations with them such individuals or companies as may [might] undertake to open a communication between the Atlantic and Pacific Oceans, by the construction of a ship canal across the isthmus which connects North and South America, and of securing forever by such stipulations *the free and equal right of navigating such canal to all such nations on the payment of such reasonable tolls as may be established to compensate the capitalists who may engage in such undertaking and complete the work.*¹⁸

By whomsoever the waterway is opened, the world-wide physical and economic effects of joining the Atlantic and Pacific remain the same, and the original understanding and desire of all civilized peoples that this stupendous change should be a work of peace for the general benefit of mankind, should be sacredly respected and made good. In his report, accompanying President Hayes' message on the Wyse concession, Mr. Evarts describes the effect of the construction of the canal as "so stupendous a change from the natural configuration of this hemisphere as transforms the Isthmus of Panama from a barrier, between the Atlantic and Pacific Oceans, into a gateway and thoroughfare between them for the navies and merchant ships of the world." The very idea of the union of the oceans and the neutralization of the connecting waterway involves equality of use and is incompatible with the erection of fortifications and the military occupation of the neutralized zone, unless for the protection of its neutrality in the event that it is seriously threatened — a contingency which neutralization itself, as exemplified

¹⁸ *Moore's Inter. Law Dig.*, III, p. 3.

by the history of the Suez Canal and the countries which have been neutralized, makes most remote and improbable.¹⁹

No people or government has made from the outset clearer declarations or more solemn pledges than the United States for the neutralization and the impartial use of the canal; and those of her citizens who would have her take advantage of her acquisition from Panama of the right to open and equip the waterway at her own cost and who would justify her in seeking to gain some special and peculiar privileges on the ground of expense and ownership, forget that she is a voluntary trustee for mankind, and that until she acquired this right and undertook this task of her own accord, she had always contended that under no circumstances should the enterprise be undertaken or conducted for military purposes or warlike advantage, or with any other end in view but the common, commercial convenience and benefit of the world. Hence it is that in the Hay-Pauncefote treaty, which supersedes the Clayton-Bulwer treaty, the neutralization of the canal, which was declared to be a "general principle" in the former treaty, is declared to be a "general principle" in the latter; and the United States therein and thereby adopts and prescribes substantially the same rules for this neutralization and impartial use of the Panama Canal as those adopted and prescribed in the treaty of October 29, 1888, between the great Powers of Europe for the regulation and conduct of the Suez Canal.

Thus it is, that, although builder and owner of the canal, the United States is not free to use it as she pleases, because before she undertook to build it, she recognized as clearly and insisted as strenuously as Great Britain that the physical change which it would make in the relation and use of the two great oceans of the globe demanded that it should be neutralized and kept free for the common and impartial service of the shipping of the world.

¹⁹ On the question of fortifying the canal, see the following articles which have appeared in this JOURNAL: "Neutralization of the Panama Canal," by Peter C. Hains, Vol. 3, p. 354 (April, 1909); "Fortification at Panama," by George W. Davis, Vol. 3, p. 885 (October, 1909); "The Real Status of the Panama Canal as Regards Neutralization," by H. S. Knapp, Vol. 4, p. 314 (April, 1910); "Fortification of the Panama Canal," by Richard Olney, Vol. 5, p. 298 (April, 1911); "The Right to Fortify the Panama Canal," by Eugene Wambaugh, Vol. 5, p. 615 (July, 1911); "The Canal Fortifications and the Treaty," by Crammond Kennedy, Vol. 5, p. 620 (July, 1911).

As early as 1826, Mr. Clay, who at that time was Secretary of State in the cabinet of Mr. John Quincy Adams, said in his instructions to Messrs. Anderson and Sergeant, the United States delegates to the Pan-American Congress at Panama which had been convoked by Bolivar:

If the work should ever be executed, so as to admit of the passage of sea vessels from ocean to ocean, the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation or reasonable tolls.²⁰

Thirty years later, referring to the purpose of the United States in negotiating the Clayton-Bulwer treaty, and to certain incidents prior to its conclusion (April, 1850), President Pierce remarked, in his message of May 15, 1856, to Congress (Mr. Marcy being Secretary of State):

Paramount to that of any European state, as was the interest of the United States in the security and freedom of projected lines of travel across the isthmus by the way of Nicaragua and Honduras, still we did not yield in this respect to any suggestions of territorial aggrandizement, or even of exclusive advantage, either of communication or of commerce. Opportunities had not been wanting to the United States to procure such advantage by peaceful means and with full and free assent of those who alone had any legitimate authority in the matter. We disregarded those opportunities *from consideration alike of domestic and foreign policy, just as, even to the present day, we have persevered in a system of justice and respect for the rights and interests of others as well as our own in regard to each and all of the States of Central America.*²¹

This presidential message was sent to Congress and discussed abroad when the Clayton-Bulwer treaty had been in operation for six years.

The significant fact, that it was the United States that invited Great Britain to enter into the Clayton-Bulwer treaty, was pointed out by the late Senator Cushman K. Davis, when, as Chairman of the Senate Committee on Foreign Relations, he reported the Hay-Pauncefote treaty of 1900, which, after being ratified by the Senate of the United States, was rejected by Great Britain on account of an amendment which had been adopted by the Senate against Senator Morgan's objections, because it seemed to him, as it did to the British Government, to

²⁰ Moore's *Int. Law Dig.*, Vol. III, p. 2.

²¹ Richardson's *Presidents' Messages*, Vol. V, p. 370.

imperil the complete and permanent neutralization of the canal. This amendment, which was inserted at the end of Section 5 of Article II of the proposed treaty, provided —

that none of the immediately foregoing conditions and stipulations in sections numbered 1, 2, 3, 4 and 5 of this article shall apply to measures which the United States may find it necessary to take for securing, by its own forces, the defense of the United States and the maintenance of public order.

In his report against this amendment, Mr. Morgan said:

Such a reservation is entirely superfluous and unnecessary and carries with it an acknowledgment in favor of Great Britain of a right of control over our national sovereignty that she does not claim and that could not be inferred from the mere silence of the treaty as to such possible right.

The only legal effect of the amendment, if it can have any effect upon our national rights or powers, is to annul the neutralization of the canal provided for in Article II of the treaty under consideration.²²

This same provision was moved again, in executive session, as an amendment to Article III of the existing treaty, but was defeated by a vote of 62 to 15 — probably on the ground, which had been indicated by Senator Morgan, that the Suez Canal being in Egypt, under the suzerainty of Turkey, it was proper that the Turkish and Egyptian rights of national defense should be reserved as they were in Article X of the Constantinople convention, whereas the Panama Canal, or any canal on the isthmus, not being an integral part of the United States, although under its control, it would go without saying that the United States could take all necessary measures "for securing by its own forces the defense of the *United States* and the maintenance of public order."

The undersigned does not admit [said Senator Morgan] the proposition that when we agree that the Nicaraguan Canal shall not be fortified as "a point of invitation for hostilities or a prize for warlike ambition," we must also provide for the right to defend our own country on the coast of California by express provisions in a treaty with Great Britain removing *objections that may arise* [italics Senator Morgan's] from the Clayton-Bulwer treaty.^{22a}

²² *Views of the Minority*, signed JOHN T. MORGAN, and reprinted in Reports of Senate Committee on Foreign Relations, 1789-1901, Vol. VIII, pp. 668-670.

^{22a} Senate Document No. 268, 56th Congress, 1st Session, p. 35.

Referring to a proposed treaty with Nicaragua, which had been negotiated in June, 1849, by Mr. Heis, United States *chargé d'affaires* in Guatemala, Mr. Davis made the following observation in his aforesaid report of April 5, 1900, from the Foreign Relations Committee of the United States Senate:

Shortly afterwards Mr. Squire negotiated a treaty of like import with Honduras, which was suppressed by the United States to make way for the Clayton-Bulwer negotiations. Nevertheless, Mr. Clayton held these treaties in the State Department and made use of them *as a means of inducing the British Government to negotiate the Clayton-Bulwer treaty.*²³

Referring to an interview which Mr. Rives, our minister to France, had at London with Lord Palmerston in 1849, and at which he had observed to his lordship, under instructions from Mr. Clayton —

that there was one question, which, unless great prudence and caution were observed on both sides, might involve the two governments, unwittingly, in collision, —

Mr. Davis explained, in this report of his from the Senate Committee on Foreign Relations, that —

That question was the support given by Great Britain to the claim of "ownership and sovereign jurisdiction by the Mosquito Indians of the mouth and lower part of the river San Juan de Nicaragua."

In that connection, Mr. Davis cited certain representations made to Lord Palmerston by Mr. Rives, under his aforesaid instructions from Mr. Clayton, among which were the following:

The United States sought no exclusive privilege or preferential right of any kind in regard to the proposed communication, and their sincere wish, if it should be found practicable, was to see it dedicated to the common use of all nations, on the most liberal terms and a footing of perfect equality for all. [Italics in the Senate committee's report.]

That the United States would not, if they could, obtain any exclusive right or privilege in a great highway which naturally belonged to all mankind. [Italics in the Senate committee's report.]

That while they aimed at no exclusive privilege for themselves, they could never consent to see so important a communication fall under the exclusive control of any other great commercial power.

²³ Reprinted in Reports of Senate Committee on Foreign Relations, 1789-1901, Vol. VIII, p. 637.

"We thus," said Mr. Davis, speaking for the Foreign Relations Committee of the Senate, in his report of April 5, 1900, "initiated and explained our fixed policy as to a canal through the Isthmus of Darien."

The adhesion of the United States to the principles of neutralization and equality, and its desire not to secure any preferential advantage in the use of an interoceanic canal, were strongly expressed by Mr. Blaine in his instructions to Mr. Lowell, under date of June 24, 1881:

The United States recognizes a proper guarantee of neutrality as essential to the construction and successful operation of any highway across the Isthmus of Panama, and in the last generation every step was taken by this government that is deemed requisite in the premises. The necessity was foreseen and abundantly provided for, long in advance of any possible call for the actual exercise of power. * * * *Nor, in time of peace, does the United States seek to have any exclusive privileges accorded to American ships in respect to precedence or tolls through an interoceanic canal any more than it has sought like privileges for American goods in transit over the Panama Railway, under the exclusive control of an American corporation.* The extent of the privileges of American citizens and ships is measurable under the treaty of 1846 by those of Colombian citizens and ships. *It would be our earnest desire and expectation to see the world's peaceful commerce enjoy the same just, liberal, and rational treatment.*²⁴

In connection with this record and the British protest against the immunity from tolls, granted to our shipping in the coastwise trade by the Panama Canal Act, it should be recalled that an amendment was offered during the debate on the earlier Hay-Pauncefote treaty of 1900, to the effect that —

*the United States reserves the right in the regulation and management of the canal to discriminate in respect of the charges of traffic in favor of vessels of its own citizens engaged in the coastwise trade;*²⁵

and that this proposed amendment was voted down in executive session by 43 to 27, — a vote which made it clear that the phrase "all nations" in the proposed treaty was intended to include the United States.

In view of the fate of the proposed amendments to the earlier treaty, no attempt was made to provide for any discrimination in the Hay-

²⁴ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, p. 174.

²⁵ Senate Document, No. 85, 57th Congress, 1st Session, injunction of secrecy removed, p. 16.

Pauncefote treaty, which was concluded in the following year (1901), and is now in force.

There never was any objection to the Clayton-Bulwer treaty by the United States on account of its "general principle of neutrality," or the use of the canal on equal terms by all nations. In his note of 20th October, 1857, when the controversy was at its height, General Cass, who was then Secretary of State, said to Lord Napier, the British minister in Washington:

The United States, as I have before had occasion to assure your lordship, demand no exclusive privileges in these passages, but will always exert their influence *to secure their free and unrestricted benefits, both in peace and war, to the commerce of the world.*²⁶

And again, on the 8th of November, 1858, referring to the spirit and purpose of the Clayton-Bulwer treaty, General Cass said to his lordship:

While the declared object of that convention had reference to the construction of a ship-canal by the way of San Juan and the Lakes of Nicaragua and Managua, from the Atlantic to the Pacific Ocean, *yet it avowed none the less plainly a general principle in reference to all practicable communications across the isthmus, and laid down a distinct policy by which the practical operation of this principle was likely to be kept free from all embarrassment. The principle was that the interoceanic routes should remain under the sovereignty of the states through which they ran, and should be neutral and free to all nations alike.*²⁷

In this same note, and in immediate connection with the preceding citation, General Cass stated the case of the United States against Great Britain as follows:

The policy was that, in order to prevent any government outside of those states from obtaining undue control or influence over those inter-oceanic transits, no such nation should erect or maintain any fortifications commanding the same, or in the vicinity thereof, or should "occupy, or fortify, or colonize, or assume, or exercise any dominion over Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America." So far as the United States and Great Britain were concerned, those stipulations were expressed in unmistakable terms; and in reference to other nations, it was declared that the "contracting parties in this convention engage to invite every state with which both or either

²⁶ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, p. 113.

²⁷ *Ibid.*, pp. 137, 138.

have friendly intercourse to enter into stipulations with them similar to those which they have entered into with each other."

At that time the United States had no possessions whatever in Central America, and exercised no dominion there. In respect to this government, therefore, the provisions of Article I of the treaty could operate only as a restriction for the future; but Great Britain was in the actual exercise of dominion over nearly the whole eastern coast of that country, and in relation to her, this article had a present as well as a prospective operation. She was to abandon the occupancy which she already had in Central America, and was neither to make acquisitions, or erect fortifications, or exercise dominion there in the future. In other words, she was to place herself in the same position with respect to possessions and dominion in Central America which was to be occupied by the United States, and which both of the contracting parties to the treaty engaged that they would endeavor to induce other nations to occupy.

This was the treaty as it was understood and consented to by the United States, and this is the treaty as it is still understood by this government.²⁸

This notable state paper closes with a masterly recapitulation of the American side of the controversy with Great Britain over the Clayton-Bulwer treaty and reiterates the adhesion of the United States to the principles of neutralization and equality, as follows:

It is of no small consequence either to the United States or Great Britain that these Central American controversies between the two countries should be forever closed. On some points of them, and, I have been led to hope, *on the general policy which ought to apply to the whole isthmian region, they have reached a common ground of agreement. The neutrality of the interoceanic routes, and their freedom from the superior and controlling influence of any one government;* the principles upon which the Mosquito protectorate may be arranged, with justice alike to the sovereignty of Nicaragua and the Indian tribes; the surrender of the Bay Islands, under certain stipulations for the benefit of trade and the protection of their British occupants; and the definition of the boundaries of British Belize; about all these points there is no apparent disagreement, except as to the conditions which shall be annexed to the Bay Islands' surrender, and as to the limits which shall be fixed to the settlements of Belize. Is it possible that, if approached in a spirit of conciliation and good feeling, these two points of difference are not susceptible of a friendly adjustment? To believe this would be to underestimate the importance of the adjustment, and the intelligent appreciation of this importance which must be entertained by both nations.

²⁸ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, p. 138.

What the United States want in Central America, next to the happiness of its people, is the security and neutrality of the interoceanic routes which lead through it. This is equally the desire of Great Britain, of France, and of the whole commercial world. If the principles and policy of the Clayton-Bulwer treaty are carried into effect, this object is accomplished.

When, therefore, Lord Malmesbury invites new overtures from this government upon the idea that it has rejected the proposal embraced in Sir William Ouseley's mission for an adjustment of the Central American questions by separate treaties with Honduras, Nicaragua, and Guatemala, upon terms substantially according with the general tenor of the American interpretation of the treaty, *I have to reply to his lordship, that this very adjustment is all that the President has ever desired*, and that, instead of having rejected that proposal, he had expressed his cordial acceptance of it, so far as he understood it, and had anticipated from it the most gratifying consequences.²⁹

In his aforesaid report of April 5, 1900, from the Foreign Relations Committee of the United States Senate, Mr. Davis makes the following citation from President Buchanan's message of December 3, 1860, to Congress, after the successful issue of Sir William Ouseley's mission to Central America:

"The discordant constructions of the Clayton and Bulwer treaty between the two governments, which at different periods of the discussion bore a threatening aspect, have resulted in a final settlement entirely satisfactory to this government."

And, speaking for the Senate Committee, Mr. Davis continues:

As no Congress from that day to this has disputed the validity and finality of this settlement, it can scarcely be justifiable now to set up those same "discordant constructions," or the alleged want of good faith in the British Government in executing the treaty, as a reason for declaring that the treaty is in fact abrogated.

The President then proceeds to restate the actual controversies and the manner of their settlement, as follows:

"In my last annual message I informed Congress that the British Government had not then 'completed treaty arrangements with the Republics of Honduras and Nicaragua in pursuance of the understanding between the two governments. It is, nevertheless, confidently expected that this good work will ere long be accomplished.'

"*This confident expectation has since been fulfilled.* Her Britannic Majesty concluded a treaty with Honduras on the 20th of November,

²⁹ "Clayton-Bulwer Treaty and Monroe Doctrine," Senate Ex. Doc. No. 194, 47th Congress, 1st Session, pp. 145, 146.

1850, and with Nicaragua on the 28th of August, 1860, relinquishing the Mosquito protectorate. Besides, by the former, the Bay Islands were recognized as part of the Republic of Honduras. *It may be observed that the stipulations of these treaties conform in every important particular to the amendments adopted by the Senate of the United States to the treaty concluded at London on the 17th of October, 1856, between the two Governments [the Dallas-Clarendon treaty].*

"It will be recollect that this treaty was rejected by the British Government, because of its objection to the just and important amendment of the Senate to the article relating to Ruatan and other islands in the Bay of Honduras."³⁰

"It is not possible," says the Senate committee, "to ignore a fact or situation so fully and impressively declared by the President in a message to Congress, and acquiesced in by the failure of Congress to signify any dissatisfaction toward the final settlement so declared, as to the only points of contention that had then arisen under the Clayton-Bulwer treaty."

Recurring again to the question whether the rules adopted by the United States, and prescribed in Article III of the Hay-Pauncefote treaty, for the neutralization of the canal [*supra*, footnote¹⁷ p. 37], require that in the event of war between the United States and a foreign Power, the war vessels of the latter should be allowed to pass through the canal on the same conditions as the war vessels of neutrals, it may be observed that the treaty seems to be framed so far as the belligerent rights of the United States in and over the canal are concerned, in case of war with a foreign Power, as though the original plan had been adopted of having the waterway opened through neutralized territory and administered by a neutralized state in accordance with rules adopted by the sovereign parties to the neutralization. The situation, however, in this respect, has been changed by the "perpetual control" acquired over the zone and the construction and administration of the canal by the United States, free from the obligation of inviting other nations to join in guaranteeing the neutrality of the canal. If a canal had been built and the United States and Great Britain had gone to war, while the Clayton-Bulwer treaty was in force, the neutral state administering the canal would have allowed the public vessels of either belligerent to pass through the canal under the rules prescribed by the states guar-

³⁰ Reports of Senate Committee on Foreign Relations, 1789-1901, Vol. VIII, pp. 641, 642.

anteeing its neutrality just as the United States would do, under the existing treaty, in its administration of the canal during a war to which it was not itself a party. But the rules adopted by the United States, in the Hay-Pauncefote treaty, do not seem to have reserved to itself such belligerent rights as the changed conditions might have justified, but to have left it in the position where it would be bound to allow such free passage to ships of war of its enemy as the neutralized state, being the territorial sovereign of the Canal Zone, would have done under the original plan.

Such vessels, if the treaty were construed literally, would simply have to make the transit (Rule 3) "with the least possible delay, without revictualling or taking in any stores during their passage, except so far as might be strictly necessary," and (Rule 4) without disembarking troops or munitions of war or warlike materials in the canal, or (Rule 5) remaining longer than twenty-four hours at any one time, except in case of distress, and no vessel of war of one belligerent could depart within twenty-four hours of the departure of a vessel of war of the other belligerent; all this, however, only in case a public vessel of a belligerent at war with the United States, could get within the three nautical miles of neutralized water at either end of the canal. The Suez Canal treaty expressly prohibits fortifications, as did the proposed Hay-Pauncefote treaty of 1900, while the present Hay-Paunceforte treaty ordains that the canal shall never be blockaded nor any right of war exercised nor any act of hostility committed within it. Nevertheless, it seems clear that the United States has no doubt as to its belligerent right in and over the canal in case it becomes involved in a war with a foreign Power, for instead of leaving the canal open for the passage of the public vessels of "all nations observing these Rules," it is fortifying both ends of the waterway and preparing to garrison the fortifications with its military forces, so that any war vessel of an enemy escaping capture or destruction on the high seas on either side of the isthmus and trying to pass through the canal, would find itself confronted with the forts defending the approach from the Atlantic or Pacific.

The British view of this question may be the same as that of the United States, now that the original plan of the administration of the canal by a neutralized state in neutralized territory, as free as the oceans

it joins, has been abandoned, and the United States at its own expense is opening the transit through the zone, of which, for that purpose, it has acquired "perpetual control and practical sovereignty." This may be indicated by the following excerpt from Sir Edward Grey's note of November 14, 1912, in which he communicates the British protest, to Mr. Bryce:

I notice that in the course of the debate in the Senate on the Panama Canal Bill the argument was used by one of the speakers that the third, fourth, and fifth rules embodied in Article 3 of the treaty show that the words "all nations" cannot include the United States, because, if the United States were at war, it is impossible to believe that it could be intended to be debarred by the treaty from using its own territory for re-victualling its war-ships or landing troops.

The same point may strike others who read nothing but the text of the Hay-Pauncefote treaty itself, and I think it is therefore worth while that I should briefly show that this argument is not well founded.

The Hay-Pauncefote treaty of 1901 aimed at carrying out the principle of the neutralization of the Panama Canal by subjecting it to the same régime as the Suez Canal. Rules 3, 4, and 5 of Article 3 of the treaty are taken almost textually from Articles 4, 5, and 6 of the Suez Canal Convention of 1888. At the date of the signature of the Hay-Pauncefote treaty the territory, on which the Isthmian Canal was to be constructed, did not belong to the United States, consequently there was no need to insert in the draft treaty provisions corresponding to those in Articles 10 and 13 of the Suez Canal Convention, which preserve the sovereign rights of Turkey and of Egypt, and stipulate that Articles 4 and 5 shall not affect the right of Turkey, as the local sovereign, and of Egypt, within the measure of her autonomy, to take such measures as may be necessary for securing the defense of Egypt and the maintenance of public order, and, in the case of Turkey, the defence of her possession on the Red Sea.

Now that the United States has become the practical sovereign of the Canal, His Majesty's Government do not question its title to exercise belligerent rights for its protection.

The United States would doubtless assume that it would be for the "protection" of the canal to prevent its passage by the public vessels of any Power with which she might be at war.

Sir Edward Grey's explanation is in harmony with what Lord Lansdowne said in his memorandum of August 3, 1901, communicated to Mr. Hay during the negotiation of the existing treaty:

I am not prepared to deny that contingencies may arise when not only from a national point of view, but on behalf of the commercial interests

of the whole world, it might be of supreme importance to the United States that they should be free to adopt measures for the defense of the canal at a moment when they were themselves engaged in hostilities.³¹

It may be said that in the Hay-Pauncefote treaty no such provision was necessary as that contained in the convention of Constantinople for securing the defensive rights of Turkey and Egypt, in whose territory the Suez Canal is situated, because no nation at war with the United States would dream of attacking the Panama Canal when the waterway was in actual use "on terms of entire equality" by all the other commercial nations of the world, any more than Russia dreamed of interfering with the Suez Canal when she was at war with the Sublime Porte. The vulnerability of the canal, the ease with which its locks could be put out of commission "by a small party of resolute men armed with a few sticks of dynamite,"³² may also tend to render it immune from flagrant war.

But, however this may be, the United States, having freed itself by the Hay-Pauncefote treaty from certain requirements of the Clayton-Bulwer treaty, including alliances or joint action with foreign governments for the protection and management of the canal, should see to it that the general principles of neutralization and equal terms, expressly preserved, re-affirmed and re-consecrated as they are in the treaty now in force, shall suffer no impairment in the administration of this self-assumed trust for mankind. Thus shall we keep the faith of the treaty and make good the long succession of our declarations and pledges as a nation.

CRAMMOND KENNEDY.

³¹ Moore's *Int. Law Dig.*, III, p. 215.

³² Senate Document, No. 54, 57th Congress, 1st Session. Report of the Isthmian Canal Commission, 1899-1901, p. 254.

CARDINAL ALBERONI: AN ITALIAN PRECURSOR OF PACIFISM AND INTERNATIONAL ARBITRATION *

Nihil sub sole novum. Ecclesiastes, I, 10.

In a previous study¹ I had occasion to state that the pacifist idea, as well as that of the juridical settlement of international conflicts, dates much farther back than is generally believed, and that it has had sincere advocates in all nations. And what is of even greater importance, international arbitration was practiced to a large extent, both in the Middle Ages and at the time of the Renaissance. I would now present to the enlightened readers of this Journal an Italian personage as one of these advocates, by stating however at the outset, that he was not the first among his compatriots, since four centuries before his time, the Venetian Marin Sanudo² had consecrated his life to that idea, while the adherents of pacifism can even claim a Dante Alighieri among their number! For many reasons, however, which will be convincingly set forth in the course of these pages, Cardinal Alberoni is deserving of especial attention. The German Gerhoch, the Frenchmen Pierre Dubois and Eméric Crucé, the Czech king George Podiebrad, the Englishman W. Penn, the Portuguese Suarez, the Spaniard Vittoria, the Hollander H. Grotius, and many others, have in him a worthy associate, a fact which I hope will be made clear by the publication of his scheme, as an appendix hereof.[†]

I

There are few men who have played a conspicuous part in history whose importance has been discussed to the same extent as that of Cardinal Alberoni. He has been vilified and glorified with equal pas-

* Translated from the French by Dr. Theodore Henckels, of Washington, D. C.

¹ VESNITCH, *Deux Précurseurs français du Pacifisme et de l'Arbitrage International*, in *Revue d'Histoire Diplomatique*, 1911.

² See: A. MAGNOCAVALLO, *Marin Sanudo il Vecchio ed il suo Progetto di Crociata*, Bergamo, 1901.

† Printed in this JOURNAL, p. 83.

sion. And while it may be said that the greatness of a statesman is correctly measured by the opposition with which he meets during his life, and even before posterity, the lack of sympathy, I should even say the lack of interest for this prelate-diplomatist is explainable on special grounds, as well as by reason of the circumstances in which he grew up. It is probably due to this reserve that the modern historians of pacifism, eager though they are to search through the past centuries for the precursors of this movement, have almost entirely failed to consider this curious personage. And his ideas, even as his entire life which was so feverish, ever on the alert and so long in years, should certainly have roused them to a special curiosity. Human psychology has in him a specimen worthy of profound study, offering a vast and promising field of work to him who would undertake it. Does it not seem strange to see this man, at the zenith of his power, almost universally traduced as the greatest disturber of the peace, when in fact he conceived the plan of the general pacification of the Christian world, he, the man of action par excellence, and at a time when this idea was the privilege of only those who were generally scoffed at, the discussion of whose ideas brought forth smiles, and who could consider themselves fortunate when they were not classed too far below "dreamers"?

Before proceeding to the consideration of the pacifist work of Cardinal Alberoni, it is necessary to make a general survey, concise as far as this is possible, of the personage and of the importance of his activities during the first half of the eighteenth century.

Jules Alberoni³ was born at Piacenza, May 21, 1664. He was the son of poor parents who, as gardeners, had come to take up their abode

³ See: S. BERSANI, *Storia del cardinale Giulio Alberoni*, Piacenza, 1861; (in reference to this, see an extended study by Ag. SAGREDO, in the *Archivio storico italiano*, vol. XVII, 1863, 2nd part, pp. 90-116); J. ROUSSET, *Histoire du Cardinal Alberoni*, etc., The Hague, 1719; MALDONADO-MACÁNEZ, *El Cardinal Alberoni*, in the *Revista de España*, 1884; LAVISSE and RAMBAUD, *Histoire générale*, etc., vol. VII, 1896; E. BOURGEOIS, *Letters intimes de J.-M. Alberoni*, Paris, 1892 (in reference: G. VALBERT, Alberoni, etc., in the *Revue des Deux Mondes*, vol. CXV, 1893, pp. 662-673); ditto, *le Secret des Farnèse, Philippe V et la politique d'Alberoni*, 1911; G. HANOTAUX, *Recueil des Instructions aux Ambassadeurs de France*, vol. XVII (Rome, vol. II) Paris, 1911; C. CANTU, *Histoire universelle*, vol. XVI and XVII, Paris, 1868; A. PROFESIONE, *Il Ministero in Spagna e il processo del card. Alberoni*, Turin, 1897; Comte DE

in this city. And if it had not been for the function the Christian church performed in the world, he would never have succeeded in bringing his talents to the fore. It was the church, or rather her servants in the Duchy of Parma, who soon became aware of his active and alert mind and made him follow a rigorous course of instruction in their seminaries, just as they had done before with his compatriot J. Mazarin. Further along in this study we will be led naturally to confront these two compatriots one with the other. Dealing with affairs relating to Spain, the author of MS. 25695 of the *Bibliothèque nationale* (pp. 204-206) indeed states: "Up to this point, we behold in Jules Alberoni another Jules Mazarin. Both were of humble birth: the former was the son of a Piacenza gardener; the father of the latter was a tenant of the Episcopal See of the same city; both started on their career in this bishopric; both attained to the dignity of prime minister of two of the principal European monarchies; and lastly both rose to the office of cardinal." In another place it is asserted that "Alberoni would have been the Mazarin of Spain, had the end been like the beginning."

Scholar and bell-ringer at the cathedral of Piacenza, and educated through charity at the Barnabite monastery in that city, Alberoni in 1702 became chaplain to the Count de Roneoveri, bishop of Borgo di San Donnino, and soon afterward, when he had learned a little French from the novelist Campistron, who had, so to say, strayed into these regions, and through his brilliant intellect won the good will and sympathy of the Duke de Vendôme, commander of French troops in Italy, the Duke de Parma made him canon and appointed him as his representative to the duke. At this moment, the course of his life changes and Alberoni's political career opens: for in 1706, Vendôme brought him to France, presented him to the king, obtained for him an annual allowance and then secured his services as secretary in his military expeditions to

BARRAL, *Etudes sur l'histoire diplomatique de l'Europe de 1648 à 1791*, Paris, 1880; A. BAUDRILLART, *Philippe V et la Cour de France*, Paris, 1890, five vols.; E. DE HECKEREN, *Correspondance de Benoît XIV*, two vols., Paris, 1912; d'HAUSSONVILLE, *La Duchesse de Bourgogne*, etc., 4 vols., 1898-1908, vol. III; *Gentleman's Magazine*, 1736; L. WIESNER, *Commencement d'Alberoni*, etc., Angers, 1892; C. MALAGOLA, *Il Card. Alberoni e la repubblica di San Marino, Bologna*, 1886; J. BUTLER, *Duke of Ormonde, the Jacobite attempt of 1717*, etc., Edinburgh, 1895; the *Archives du Ministère des Affaires étrangères*; Fonds *Rome* and *Espagne*.

the Netherlands and Spain, in the course of which he was sent on a mission to certain of the provinces for the purpose of consolidating the partisans of Philip V. After his protector had breathed his last in the arms of his dear abbé, Alberoni returned to France in 1712 to report to Louis XIV upon conditions in Spain. The following year we find him already in Madrid as *chargé d'affaires* of the Duke de Parma. Soon thereafter (1714), Queen Gabrielle of Savoy dies, and he avails himself of the new situation at the Spanish court to improve his fortune. His own activities in the preparation for the new marriage of Philip V to Élisabeth Farnèse, the daughter of his master and sovereign, are so well known that it is thought superfluous to refer to them at this time. His rivalries and strifes more than any other of his actions have been studied and described, possibly on account of their picturesqueness. Frédéric II declares in his *Mémoires* (Paris, 1866, vol. I, p. 26) that Cardinal Alberoni's temperament was very similar to that of the new queen, whom he portrays in these few masterly strokes: "Spartan haughtiness and English obstinacy, combined with Italian elegance and French vivacity; she proceeded audaciously to the accomplishment of her designs; nothing ever took her by surprise, nothing could stay her." Two persons of this same nature might meet; both might start on their journey at the same time; but they could not long continue in each other's company. The little Princess de Parma, after her sudden and unexpected elevation to the throne of Spain, wanted to rule as absolute mistress; and this prelate-diplomatist, who was climbing the ecclesiastical and social ladder with lightning rapidity, his elevation to the ranks of the nobility, his appointment to one of the most important Spanish bishoprics and his cardinal's hat annoyed her in the royal entourage, the more so because he was her compatriot, because he was indefatigable in his activities, inexhaustible in his intellectual resources and at the same time endowed with an indomitable will power. Europe, rather the Imperial and Franco-English diplomacy, energetically opposed Alberoni, the prime minister of Spain and distinguished Italian patriot; his *tendo Achillis* was, however, wounded first by the weak nature of Philip V and by the jealous vanity of the latter's young wife. To the reproach that she had appointed Alberoni, a foreigner, as head of her government, Élisabeth answered: "That is true; we appointed him, or to be more correct,

it was he who appointed himself and became our unbearable master." To this, the king added: "He's a beastly brute." After the departure of Alberoni, the queen could not help acknowledging she considered him "a brilliant man and a great minister." After he had been driven out of Spain, Cardinal Alberoni wrote to Cardinal de Polignac: "Spain was a corpse. I brought the corpse to life again. After my departure, it returned to its coffin." On another occasion, he bemoans the weakness of his Spanish master, saying that "caught between a prayer-stool and a woman, he became oblivious to the existence of the external world."

Modern history has already reached the turning-point, where it becomes evident justice must be rendered to this statesman. Like a quickening flash he touched Spain which had fallen into lethargy and was slowly succumbing to it. We present here the record of his activity as head of the government; it is the work of experts: Messrs. Lavisson and Rambaud (p. 42):

He revised the conditions on which the right to levy certain taxes was granted; formulated a new scale of customs, so as to reduce the amount of foreign importations; and on the other hand he granted free exportation of native wines; he examined the question of colonial contraband and repressed its traffic; he built a national printery and established a woollen manufacture which furnished the clothing for the soldiers; he appealed to the merchants of the entire nation in behalf of common honesty, and called Dutch workmen to Spain for the manufacture of woollen and fine linen goods. As a means to recruit officers for the navy he founded the Cadiz Naval Academy; he revived the artillery foundries and the manufacture of weapons at Barcelona and Malaga, launched fourteen new vessels, laid the keel for as many more and had even two built at Havana. He rebuilt the harbor of Cadiz, constructed the port of Ferial, fortified Barcelona which he wanted to become the Mediterranean rival of Toulon and ruler over that sea; in the Pyrenees he made Pampelune so strong that in 1719 the French dared not lay siege to it. . . .

When we consider that this immense amount of work was performed in very little time, and at a time when neither railroads nor the telegraph were at the disposal of governments, we come to judge with greater impartiality, if not with more sympathy, the things accomplished for Spain by Cardinal Alberoni, to whom Mgr. Bandrillart (*loc. cit.* II, p. 400) refuses the title of "a great statesman," in spite of the fact that he recognizes in him "a man of incontestable talent, of a bold spirit and

energetic character."⁴ And all this internal work was simply the posterior evidence of the external policy of Spain as conceived by Alberoni, consisting in the proposition to regenerate that country in the eyes of Europe and of the world, and to recover for it the preponderating position which it had occupied in past centuries. We shall not explore the labyrinth of this bold diplomacy which men of greater authority have already exhaustively studied. We would venture, however, to remark that we find unjustified the reproaches which have become common-places and according to which he intended to make his own country, Italy, profit by this regeneration of Spain. Were not these tendencies, on the one hand, quite in harmony with human nature, and did he not, on the other hand, reconcile them with the highest interests of European peace? On the morning following his dismissal, he wrote to one of his friends, who was also his confidant: "It was the smallest sacrifice that could be made to insure the peace of Europe." Before long he is driven from Spain, followed while on his way to Rome, seized, cast into prison and prosecuted. But he will know how to hold out against his detractors; he will know how to fight and defend himself with the weapons of the time, if necessary; but howsoever he fight, he will fight successfully. His enemies went so far as to say that he had been the paramour of Queen Élisabeth. To disprove this accusation, it would be sufficient for him to point to his portrait,⁵ and to the haughtiness of his young sovereign. But the accusation of having sought to enrich himself by the misuse of public funds wounded him to the quick. Later on in his life he refutes this charge with vigor.⁶ Nearly ten years later (July 4, 1727), Maréchal

⁴ One of his contemporaries, L. FERRARI, *Delle Notizie storiche della lega fra l'Imperatore Carlo VI e la Repubblica di Venezia*, etc., Venice, 1723 (pp. 259-260), characterizes him as follows: "A keen man, quick in his work, fertile in resources and one to whom nothing seems difficult: a man who when silent, yet speaks, and speaking he enchanteth, and so wonderfully. * * *" A German, *Universal-Lexicon*, Suppl. I, p. 903, speaks of him in 1751 as a "perfect politician and great statesman."

⁵ One of his first biographers belittles him in the following terms: "The cardinal is of small stature; rather too corpulent than too thin; his face is not at all attractive; it is too broad, because his head is too large." Of his eyes alone he speaks well.

⁶ "Those who are acquainted with my career," he writes about the year 1735, "are honest enough to certify that I never made wealth my idol; and on this point I appeal to my own conscience. If I were a man who delights in the love of lucre, there are few who have had greater opportunity to acquire riches. I might say that I had

de Villars, one of the few men who at that time spoke favorably of the ability of the cardinal, writes in his *Mémoires* (vol. V, p. 138) of a "current rumor about the journey of Cardinal Alberoni to Madrid," adding that this rumor lacks confirmation,—a fact which proves the continued interest which the Court of Versailles took in him. Only once thereafter, when, as Papal legate to Romagna, he had temporarily united the Republic of San Marino with the States of the Church, the people as a whole took an especial interest in him.

He was a source of even greater interest to diplomatists. As an instance, we reproduce here words written on February 18, 1736 by the Duke de Saint-Aignan, who was at Rome at that time. These words are quoted from a report the duke had transmitted to his government, a report which all modern aspirants to the diplomatic career ought to read: the duke does not enter into details, having fully delineated him in his official dispatches forwarded from Madrid, where during four years he had resided as ambassador. He writes:

The great rôle which he has played, the independence which his disfavors compelled him to assume, the consequent relations into which he entered with the zealots, some external traits such as contempt for pomp, a kind of personal unreservedness and a keen interest in all matters concerning public welfare made him a rather conspicuous personage at that court; and many there were who thought that luck, which had done so much for him, was holding him in reserve for further government service. But his conduct in the Romagna legation, which he accepted only because he would not have it said that he had never served the Holy See, has done him a harm from which he will find it difficult to recover, so that what he had imagined would pave his way to the Pontificate may perhaps prove the greatest obstacle to his ambition. And in truth, beside the fact that the public had criticized his ready willingness to give up, for an office of this nature, the retired life of a philosopher, which he had made up his mind to live on his estate of Castel-Romano, saying that he would either have to rule a world or cultivate a cabbage-patch; and far from trying to prove himself worthy

become his treasurer when the Duke de Vendôme honored me with his confidence. Frequently he teased me because of my contempt for money, stating that he believed I would never take great pains to discover the philosopher's stone. My station in Spain offered me opportunities to acquire immense wealth. Yet I never spent more than was necessary to keep up my position as minister. I did not allow a single one of my relatives to come near me." And still later, in 1742, he adds that he will be "in history, an example of strange calumnies and persecutions."

of the high regard in which he was held, he discredited himself by his oddities, by his too rigid sternness and his lack of consideration for the nobility, which did not bring him popular favor; by his unwarranted haughtiness; and withal, he was not entirely proof against unfounded notions of fear. Again, the depotism which he intended to exercise, the direct correspondence which he desired to carry on with the Pope, his treatise on taxes, so contrary to all accepted principles, in the writing of which he had been misled by the Imperials, have set the Holy Father, the Ministers and the Sacred College so against his administration that he would have been dismissed forthwith, if they had not feared the liberty which he assumes in speaking, showing sovereign contempt for the most of his confrères, imagining that for ability there is none to compare with him. He said frequently to His Holiness that all this was merely an open synagogue. And it is in order to guard against this kind of liberties that it was decided to keep him away from here; but, in spite of all I have just stated, and without feeling in the least way offended by the reputation which he thought he enjoyed, I owe it to him to say that I have only praise for the sentiments which he entertains for France as a whole, as well as for myself personally, ever since I came to Rome; but I am not equally satisfied with his manner toward the King of the Two-Sicilies, whom he failed to greet on his passage near this city, nor with his way of thinking of the King of Sardinia, whom I might suspect of influencing the misunderstanding between the courts of Madrid and Turin which we have never been able to remove. It has been said that the Cardinal had a representative in Vienna at the time of the signing of our Preliminaries; but I am not sufficiently informed of this and can only speak of it as a matter which ought to be carefully looked into.

In the *MEMOIR TO SERVE AS INSTRUCTION FOR THE ARCHBISHOP OF BOURGES, . . . going as ambassador extraordinary of His Majesty to Our Holy Father the Pope*, 1745, we read that the ambassador must apply to Cardinal Alberoni for information, "that one may depend as much upon the reliability of his information after he has promised to give it as upon his skill to secure reliable information." Cardinal de Rohan, who in his turn is going to Rome as ambassador, is directed to ask the opinion of Cardinal Alberoni. It will not be without interest to quote still another passage taken from a letter of Benoît XIV, dated March 29, 1743 to Cardinal de Tencin:

On the evidently false supposition that Cardinal Alberoni had recruited men for the Spaniards against the Austrians in the last action of Campo Santo, it is proposed, without informing him of this report and without giving him the opportunity to be heard, to recall him from his

legation. They are threatening to ravage the country, to seize the person of this cardinal and to sack the college which he built at Piacenza. My dear Cardinal, can there be anything more horrible? We are thinking of summoning the cardinal to Rome, so that he may give an account of himself to the Pope, before whom he stands accused and who is his superior; but leaving him his legation nevertheless. We do not know whether he is willing to come, or if willing, whether he can come, for he has been ill several months.

The cardinal is advancing in years, and reports concerning his health become more and more frequent in the correspondence. Here is one such reference, taken from a letter of the same Pope, dated March 8, 1752: "The Milan messenger has brought us bad news about Cardinal Alberoni, who will probably recover without the assistance of any doctor and without poultices, by eating salt-pork and sausages." But shortly afterward he died, on June 26 of the same year, in his native city which, during his life-time, he endowed with a college for preparing young men for the priesthood, and to which he bequeathed the major part of his fortune. This "unworthy priest and dangerous minister" in the opinion of some; this "base valet and dregs of the people, buffoon, charlatan" according to Saint-Simon, this "meddlesome individual" and "second-rate statesman" as Valbert characterizes him, is, in the judgment of Voltaire, the "most powerful genius which has governed Spain long enough to bring her glory, and not long enough for the greatness of that State." Lord Stanhope passed judgment upon him in these terms: "If Spain could go on in this way and succeed as well in all the other enterprises he means to carry out, there will be no Power can oppose her." In a *NOTICE SUR LE RÈGNE DE PHILIPPE V ET SUR LE MINISTÈRE DU CARDINAL ALBERONI*, written soon after his death, we find the following: "Alberoni died in 1752, leaving the reputation of a politician and minister as enterprising and ambitious as Cardinal Richelieu; supple and skillful as Mazarin. But, possessed of their great qualities, he also had their shortcomings. His genius was vast, his projects were immense, but fortune was against him." And this moral portrait comes perhaps nearest to the original. Alberoni, moreover, has written a description of himself, in a letter of 1742, when he was already advanced in years. He says: "The more difficulties a man of spirit encounters in an enterprise, the greater must be the courage, perseverance and obstinacy with

which he shall pursue it; he must never give it up, except when all hope of carrying it out has vanished. *In the end, Fortune still honors men of courage.*"

II

Historians and publicists who have been interested in the political views of Cardinal Alberoni have concerned themselves, as a rule, with the book published at Lausanne in 1753, entitled *TESTAMENT POLITIQUE DU CARDINAL JULES ALBERONI, recueilli de divers mémoires, lettres et entretiens de Son Éminence par Monsignor A. M.; translated by C. de R. B. M.* But, for a long time we have known that this is a spurious work.⁷

Much more interesting, according to authentic probability, is the brochure which was simultaneously published in German and English in 1736, during the life-time of the Cardinal, bearing this title: *DES WELTBERÜHMten CARDINALS ALBERONI VORSCHLAG DAS TÜRKISCHE REICH UNTER DER CHRISTLICHEN POTENTATEN BOTMÄSSIGKEIT ZU BRINGEN, Samt der Art und Weise wie dasselbe nach der Ueberwindung unter sie zu Vertheilen, etc., etc., Gedruckt im Jahre, 1736.* The English title of the book is even fuller and represents better both the content and the ideas therein expounded. It is as follows: *CARDINAL ALBERONI'S SCHEME FOR REDUCING THE TURKISH EMPIRE TO THE OBEDIENCE OF CHRISTIAN PRINCES, Together with a scheme of a perpetual diet for establishing the public tranquility * * * London, Printed for J. Torbuck in*

⁷ Writers of that time did not question the authenticity of this *TESTAMENT POLITIQUE*. The *Göttingische Anzeigen von Gelehrten Sachen* of June 2, 1753 (pp. 610-613) calls attention to the book and discusses it earnestly. In the *DIZIONARIO DI OPERE ANONIME E PSEUDONIME DI SCRITTORI ITALIANI* (Milan, 1859, vol. III, p. 141) we read that the manuscript was bought in Madrid and thence brought to Lausanne! It is also referred to in the *DICTIONNAIRE DES OUVRAGES ANONYMES ET PSEUDONYMES* (Paris, vol. III, p. 312). And yet it is the work of two French publicists, Duray de Morsant (1717-1795) and Maubert de Gouveste (1721-1767), two of the many intellectual adventurers who thrived at that time. Maubert de Gouveste also wrote *HISTOIRE POLITIQUE DU SIÈCLE* during his sojourn in England, and in turn became chief editor of the *Journal Officiel* in Brussels (1759) and director of an itinerant French theatrical troupe on its passage through Wurtemberg. He left a large number of works. Writing about this *Testament Politique*, Sabatier says: "It is impossible to read it, and not be impressed by the depth of thought, the elegance of reflection and the precision of reasoning!"

Clarke-Court, Drury Lane, and sold at the Pamphlet-Shops at the Royal Exchange, Temple-Bar and Charing-Cross, 1736. Two editions of this English publication were printed in the same year. In addition, both the German and English editions state that they are translations from the Italian: the former, that the original is in the hands of a minister who belongs to the nobility, while the latter is more definite; for it states that the original manuscript is in the possession of the Prince de Torella, Sicilian ambassador to the French court. And it is true that a Sicilian ambassador of that name had about this time resided for about two years in Paris. After a search of more than ten years, we have at last succeeded in finding an Italian manuscript of this work. It is preserved in the *Museo Civico Correr*, in Venice (Codice Correr 1206/2643), and is entitled: *PROGETTO DEL CARDINALE ALBERONI, per ridurre l'Impero Turchesco alla Obedienza dei Principi Cristiani, e per dividere tra di essi la conquista del Medesimo.*⁸ The last part of the manuscript contains a *Progetto di una Dieta Perpetua*.

But as early as 1735, the *Mercure historique et politique*, The Hague (vol. XCIX, pp. 467-476), published an extended Paris correspondence for October of the same year, in which we find printed in full a *SYSTÈME DE PACIFICATION GÉNÉRALE, DANS LA PRÉSENTE CONJONCTURE*, translated from the Italian, preceded by these few lines:

⁸ My friend, professor G. Dalla Santa, Assistant Director of the Archives of Venice, informed me that the manuscript came from a collection brought together by the Venetian senator Theodor Carrer, born at Venice, December 12, 1750 and dying there in 1830, whose mother, Marie-Anne Pettagno, of the princely family di Trebisaccia, had been a Neapolitan, a fact which, to a certain extent, associates the manuscript with the princely de Torella family. The Venice manuscript is doubtless a copy. I have taken great pains to find the original (supposing that it was still in existence); but so far these efforts have not been rewarded. The distinguished director of the State Archives of Naples, Professor Casanova, has upon my request, devoted himself actively to this task, and we have not given up hope of finding some day the final clue to this point.

The larger portion of this manuscript was published in Venice (Stabil. typ., di P. Naratovich, 1806, 8°-32), by a Mr. Tipaldo Foresti, on the occasion of the marriage of a friend, and entitled: *PER LE AUSPICANTISSIME NOZZE DEL SIGNOR GIULIO SQUETAROLI COLLA SIGN^A GIUSEPPINA SARTORI*. This accounts for the fact that public libraries, even in Italy, are uninformed concerning this publication. Still, in his day Casati called attention to it in the *Revue des Questions Historiques* (1869, vol. VI, p. 582).

* * * Everyone is lending a hand in the building of the grand structure (Peace), and as a result we have several projects of pacification. This one is readable both by reason of the form which the author gives to the system he sets forth, and because of the position he occupied and which gives him rank among the ministers and the greatest politicians (in a note: "l'eminenteissime Cardinal Alberoni"). We are all the more pleased to give here a translation of it, because it merely represents a project as such, and because throughout the author shows due regard for the Powers to which he refers.

Before taking up the real subject of our study, which is the very project contained in the English and German editions and in the Italian manuscript, it may be profitable and interesting to reproduce right now this "*Système de Pacification*." This exposition seems to us the more necessary because it is our impression that we are dealing with two distinct manuscripts; and it is quite possible that both go back to the same source, provided they are of different dates.⁹

The author of the project as given in this correspondence begins thus: To be just, a war must aim at correcting wrongs which it is found can not be remedied except by a resort to arms; and such a war must lead to the establishment of a peace whose duration shall be made permanent by the help of a number of Powers whose interests shall be served by it. The war which has presently broken out between the Imperial and Bourbon families is of such an extraordinary nature that it encompasses the two extremities of Europe from the north to the south; it brings before our eyes interests hitherto unsuspected; and there is not a state in Christian Europe but is more or less affected by it. It has roused so many pretensions of every kind and description that it would seem impracticable to conciliate them, if divine Providence does not intervene in some special manner. Without this divine favor, we are on the eve of beholding Europe involved in a general conflagration whose consequences seem clear enough to make us tremble, and the end of which the human mind is unable to forecast. In order that there might be hope for reconciliation, these two great families should lay aside their old pretensions in the interest of public welfare and Christianity. A

⁹ Cantu and, after him, Bersani (pp. 385-386) believe that these projects were written about 1724. The latter adds: "An alliance between all the princes and the Italian republics was subsequently proposed for the purpose of driving all foreigners from Italy. But I know nothing as to that, except that some writer may by way of diversion have sought to hold up to ridicule these ideas of Alberoni as vaporings and chimeras of a demented and unhealthy mind." These two authors are mistaken: the reader will readily judge for himself in the course of this study that the main project at least could not have been written before 1730.

definite basis must be found on which this reconciliation can be worked out, so that through their agreement a settlement of all other pretensions may be reached in conformity with equity and public weal.

Since there is little likelihood of curing unusual diseases by ordinary remedies, and the very foundations of Europe have been shaken in the present conjuncture, it seems necessary to devise a system likely to strengthen them. It would seem to be for the absolute interest of whole Christian Europe that the attention of the emperors of Germany should be directed solely to the defense of their territory against the power of the Ottoman Empire, and to seek to extend their dominions in that direction only. This will give them a wide enough field for action in all that is praiseworthy and interesting in ambition. Their alliances with the Russian Empire and Poland, which would render them terrible to the remainder of Christianity, if they were to enforce their pretensions on this side, might be profitably exploited on the other side. They would have the means to induce the Princes of the Empire to combine all their forces for the purpose of conquering Turkish territory by rewarding these Princes with some of the domains belonging to the House of Austria, in Germany, as they were making progress toward the Orient. All the other Powers of Christianity, being certain that they need no longer fear encroachment by the emperors upon their rights, would assist them in their efforts to extend their dominions at the expense of the infidels. In such action, each would find his interest and security, it being true that the different possessions heretofore occupied by the House of Austria in various quarters have been the main cause of the troubles in Europe.

The system, which begins here, seems evidently to have been that of Emperor Charles the Fifth, when, with the bestowal of the Imperial Crown upon him, he restricted the authority of his brother Ferdinand to the hereditary states of the House of Austria in Germany, that is, to the kingdoms of Bohemia and Hungary, although at that time these did not extend as far as at present. Providence seems to have prompted the birth of an occasion that would revive this system. The fact that the Emperor leaves only a female and contested succession should make him dread the prospect of leaving his states in dispute, in case he should unfortunately die in the tumult into which the war has brought the affairs of Europe: it would be reasonable of him, in regard to his elder daughter, intended to be married to the Duke de Lorraine, if he should conclude to content himself with the bequest which Charles the Fifth made to Emperor Ferdinand; and that, as to his younger daughter, he should give her in marriage to Don Carlos, by acknowledging him as King of Naples and of Sicily. It would be expedient to induce the Emperor to renounce all his pretensions to Italy, and to enact a law to the effect that the two princesses, his daughters, or their children may never inherit from each other.

Italy has for centuries been a constant source of trouble between the

Christian Princes, and an evident occasion for the infidels to push their conquests in Europe. History shows that the insistence with which the emperors pressed their Italian pretensions has on various occasions contributed to the aggrandizement of the Ottomans. It was for the purpose of putting an end to the fatal consequences of these pretensions that Charles the Fifth left not a foot of ground to his brother Ferdinand in Italy, in conferring the Imperial dignity upon him. The same reasons still prevail; and it seems expedient for the peace of Europe to enact a statute to the effect that no foreign Power may ever possess a state in Italy; that the various principalities composing Italy should form a government modelled after the Germanic body, with a General Diet, to decide upon all matters concerning the common weal; that every right of investiture and of foreign dependence should be abolished; and that the Italic body, in all matters coming within its sphere of competency, should be clothed with the same authority of decision as that possessed by the Germanic body.

Italian security established under this form of government would require the guaranty of the contracting Powers: it would also require very close relations with the Helvetic body for guarding the Alpine barriers. The barrier on the side of France concerns of course, the King of Sardinia; and the possession of the Duchy of Milan would tend to increase both his vigilance and his power. The fortress of Tortone should, however, be taken from him, so that it might serve as a defense for the Duchy of Parma. The barrier on the side of Germany would have to be guarded by the Venetians and the Princes whose states are bordering on the Lower-Pô, and on whom it would devolve, at common expense to guard every entrance and to keep a strong Swiss garrison in Mantua. The Pope, the King of the Two Sicilies and the other maritime sovereigns, would all be taxed so that they might have a strong fleet, ever ready to watch over the defense of Italy from the sea with the help of the Grand-Master of Malta: and all these things would come to pass in consequence of the resolutions which the General Diet would pass in regard to these matters. According to these arrangements it seems that Italy would not only enjoy complete tranquility, but also be able to contribute by her united forces to the humiliation of the infidels. Complete freedom of her commerce would strengthen the guaranty which the Christian Powers had engaged to insure to her.

By the constitution, inviolably established to exclude every foreign sovereignty from the possession of any state in Italy, it would follow, that if the King of the Two Sicilies should die childless, or be called to the throne of Spain, the crown which he wears would be declared transferred to his brother Don Philippe, to whom, for greater certainty, there may be granted even now a domain in Italy. The number of principalities of which the Italic body is to be composed shall be determined, and it shall be agreed upon that if it so happened that any one of them should leave a female succession, it shall then be the duty of the

General Diet to exercise guardianship over it, and it shall also be agreed upon that this heiress may not marry except with the approval of the Diet. If it should happen that some one principality had no legitimate heir, the Diet shall have the right to choose a successor by a majority of votes, possessed of the qualities required to fill the vacancy in the Italic body, which shall always in regard to the number of states included therein, be kept on the basis that shall presently be determined.

Nothing better proves the intention of Charles the Fifth to enlist his brother in the defense of Europe against the infidels than the fact that he separated the Netherlands from his dominion. He had indeed foreseen the inevitable difficulties and diversions which the possession of this state would cause him; he preferred to leave its administration to Spain, in spite of the inconveniences of distance. For the same reasons it seems expedient to separate all the Emperor's possessions in the Netherlands and in the Grand-Duchy of Luxembourg, from the domain granted to his elder daughter, and to bestow them upon a prince who would like nothing better than to become closely united with the States-General, to watch over their mutual preservation. This principality seems suited to the Elector of Bavaria; it would satisfy all the pretensions he presses against the Austrian succession, and compel him to lend a strong hand to the Emperor against the infidels. This prince, backed by all the power of the Empire and Great Britain, would strengthen Bavaria against the suspicions which the proximity of France might rouse.

The same reasons that make it convenient to remove the Emperor from any possession on this side of the Rhine, apply equally to Lorraine, supposing the Emperor should designate the Duke of Lorraine as his successor. This state, surrounded by those of the King of France, would be a perpetual source of trouble and worry. To remedy this condition and to properly indemnify France for the expenses she may have incurred to insure to the Emperor a permanent and solid peace, it would seem convenient for the peace of Europe to transfer this state absolutely to France, and to find adequate compensation in Italy for the House of Lorraine, to the exclusion of a duke of Lorraine who is Emperor. It seems that the Duchy of Parma might be adequate to remove this house from the Imperial branch, and also in order that, in conjunction with the Pope and the other powers of the Italic body, the balance might be maintained between the Kings of Naples and of Sardinia.

It would seem that, through the execution of this system, all the old sources of quarrels between the Houses of Austria and Bourbon might be entirely removed. Nothing would prevent them from acting concertedly in order to drive the infidels out of Christendom, to settle all differences pending between their neighbors, to render justice to whom it is due and to establish commerce on a footing of equality which encourages industry and honesty among all nations. Thus, enjoying peaceful possession of their legitimate states the Christians will then

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Nothing better proves the intention of Charles the Fifth to enlist his brother in the defense of Europe against the mœurs than the fact that he separated the Netherlands from his dominion. He had indeed foreseen the imminent difficulties and diversions which the possession of this state would cause him; he preferred to leave its administration to Spain, in spite of the inconvieniences of distance. For the same reasons it seems expedient to separate all the Emperor's possessions in the Netherlands and in the Grand-Duchy of Luxembourg, from the domain granted to his elder daughter, and to bestow them upon a prince who would like nothing better than to become closely united with the States-General, to watch over their mutual preservation. This principality seems suited to the Elector of Bavaria; it would satisfy all the pretensions he presses against the Austrian succession, and compel him to lend a strong hand to the Emperor against the mœurs. This prince, backed by all the power of the Empire and Great Britain, would strengthen Bavaria against the suspicions which the proximity of France might rouse.

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think of relieving their subjects, harassed by wars or by apprehensions of wars which follow conditions of uncertainty and jealousy. They will think of exploiting those ample colonies which America offers to them and which deserve more attention than European quarrels have made possible to give to them up to the present. They will have a beautiful open field, within which to exercise their power and their prowess against the infidels, and to set their conscience at peace for the shedding of Christian blood of which the indecision of their pretensions has been responsible in the course of the latter centuries.

The real project of Cardinal Alberoni, which we shall examine in the course of this study, differs in some parts from the exposition given in this correspondence. And the question arises quite naturally: did the correspondent of the *Mercure historique et politique* have before him a project of Cardinal Alberoni other than the one whose authenticity we have no reason to suspect? This is possible and even probable in view of the fact that the best biographers of the Cardinal maintain that he thought much about the organization of Italy, of which, however, there are hardly any traces in the main project. Or, did he know of the real project of the cardinal only from hear-say, and as for the rest gave free rein to his imagination? However that may be, we thought it interesting to confront these two compositions with each other.

One thing is absolutely certain: Cardinal Alberoni was always at heart a convinced pacifist, in spite of the compelling necessities that made him wage wars. "War is a chastisement of God!" he writes, February 13, 1719; and in his letters he frequently expresses regret on account of the instability of conditions in Europe and the absence of a proper system.¹⁰ On October 24, 1718 he already referred to the Netherlands as the country destined to contribute the most to the general pacification of Europe, and adds at the same time that the Archduke of Austria "will in time become extremely fateful to the rights and liberties

¹⁰ Among modern historians, Mr. E. Bourgeois is undoubtedly the one who has penetrated deepest into the soul of Cardinal Alberoni; for he has, as we know, successfully studied him for many years. Recently, while engaged in the preparation of this study, I asked him some questions in answer to which he said among other things: "I quite agree with you that Alberoni, who has been represented as a mischief-maker, was rather a pacifist, or at least a peaceful man, in the sense that, as a son of that Italy which in the eighteenth century was the appointed arena for the wars of Germany and France, of the Habsburg and Bourbon houses, he deplored the ravaged fields, the crops which were destroyed, and the ruined peasants."

of the people." The peace which he found on leaving Spain, and the meditations to which he could surrender himself, enabled him to follow that same path which had been traced for him on the day when he became a priest. Has not the Christian religion always preached love between nations as well as between individuals, and have not the Popes been the apostles of international peace, at least in the Christian world, through all the centuries? Was not Leo XIII the faithful follower of these traditions, when on December 31, 1885, he wrote to Prince Bismarck that arbitration in international conflicts was "the function most in harmony with the nature and spirit of the Roman pontificate"?

III

While still an abbot, and as secretary and trusted man of the Duke de Vendôme, Alberoni spent some time at the military camps of his master and protector. He had acquired a familiarity with the French language to the extent that from that time he wrote in that language, even to some of his Italian friends. There is every reason to believe that he found in the duke's library, and certainly among the books of his officers, and that he read the book which the great Captain Henry de Rohan had written and dedicated to Cardinal Richelieu, published the first time in 1639 under the title: **DE L'INTEREST DES PRINCES ET ÉTATS DE LA CHRESTIENTÉ**, Paris, in -8°, a work which is the "fruit of long labor" and of earnest meditation, and was followed by a series of publications to which it served as a model and of which it was the first,¹¹ both by

¹¹ We have thus, for instance: **INTÉRÉTS ET MAXIMES DES PRINCES ET DES ÉTATS SOUVERAINS**, printed at Cologne by Jean du Pats, 1666 (16°, 248) whose authorship is erroneously attributed to the Duke de Rohan. This is made clear through the publication, in the same year and by the same anonymous author, of **MAXIMES DES PRINCES ET ÉTATS SOUVERAINS** (Cologne, 1666, 16°, 245). "M. de Rohan," we read in the preface to this volume, "who was an excellent captain and one of the great politicians of his time * * * has written on this subject and has succeeded very well, but he is very concise and writes of only a few Christian Princes, whilst the author of this book writes of all the important Sovereigns of Christianity and of all Infidel Potentates whose interests are the same, or because of their situation and their proximity or for some other consideration. It is true that he has followed in the traces of M. de Rohan, followed his plan and his thoughts, and availed himself of his divisions and expressions in most of the matters of which both have treated * * * Christians are divided into three different parties (p. 207), Catholics, Greeks and

reason of the strong arguments and the reputation of the author. It is even probable that these two circles had followed the traditions of *La Noue*, and of his *DISCOURS SUR LES TURCS*, in which he had addressed a fervent appeal for the reconciliation of Christian Europe against the Turks. Was not the *Télémaque* of Fénelon the favorite book of that whole generation? I have refrained from referring to the writings of Pierre Dubois and Éméric Crucé, because I am persuaded that Alberoni had drawn no direct inspiration from them. But it would most likely surprise the reader if we should not at this time refer to the work of the Abbé de Saint-Pierre, who, in the judgment of many, exerted some influence upon the thinkers of that time, and who we might suppose had also contributed to the determination of Alberoni to write his project.

There is nothing less founded in fact than that supposition. Just a few characteristic aspects of the work of the Abbé de Saint-Pierre will enlighten us forthwith. In the first place, what about the beginning of this work? In the course of the winter of 1706, the Abbé de Saint-Pierre was traveling in Lower Normandy, his native land,—and, in passing, we may add that it is also the country of Dubois, and very probably of Crucé as well,—his chaise upset, was broken and sunk into the mud so that he was left "in the mud and the rain till well along into the night." This incident led to his *Mémoire sur la réparation des chemins* (January, 1708), and on drawing to the close of the work, he stopped suddenly, astounded. "I was putting the finishing touches to this memoir," he says, "when there presented itself to my mind the project of a structure whose beauty struck me with wonder. For a fortnight it has taxed all my attention. I feel the more inclined to look into it carefully, because the more I

Protestants. These three do not love each other. * * * So many divisions, maintaining incessant war in Christianity, give confidence to the Turk that he will not be pushed from that quarter. * * * Those Christian Princes who are at war must conclude peace and combine their forces against that common enemy," the Turk.—See also, Aug. Langel, *HENRY DE ROHAN, SON RÔLE POLITIQUE ET MILITAIRE SOUS LOUIS XIII*, Paris, 1889. To be added *NOUVEAUX INTÉRÊTS DES PRINCES DE L'EUROPE où l'on traite des maximes qu'ils doivent observer pour se maintenir dans leurs États et pour empêcher qu'il ne se forme une monarchie universelle*. Cologne, 1685, 12°, 420. This work was reprinted in 1688, in 1690 and in 1712, showing the great interest people took in these questions.

am thinking of it . . . the more I find it advantageous for the sovereigns. I mean the establishment of permanent arbitration among themselves so as to settle their future differences without resorting to war and also to maintain perpetual relations between all the nations. * * * It is filled with this hope that with zeal and joy I am giving myself to the greatest enterprise that may dawn upon the human mind. I do not know whither I shall go; but I remember the saying of Socrates: that we go far when we have the courage to walk for a long time and over the same road."

In his PROJECT FOR A TREATY TO MAKE PEACE PERPETUAL BETWEEN THE CHRISTIAN SOVEREIGNS; *to maintain Commerce everlastinglly free between the nations, to further strengthen the Sovereign Houses on the Throne, etc.*, Utrecht, 1717, in -8°,¹² and which he revised several times, he claims to have been inspired in his work by the similar project, attributed by Sully to Henry IV, while in fact he would have been nearer truth if he had confessed the real source of his work, that is to say, *Nouveau Cynée* of Émeric Crucé. It would, of course, not be pleasing to the pride of an academician, dealing with the question of pacification, if he should disregard a similar book by one of his compatriots; for, since Crucé's own general ideas form the very foundation of the famous work of the Abbé de Saint-Pierre, there can not be the slightest doubt but that he was acquainted with the work, that he was greatly inspired by it, that he has even denatured it by attempting to draw out and complicate the clear and exact ideas of his predecessor who was not a member of the French Academy, but who in this matter at least had risen superior to his compiler, or to be more exact, to his plagiarist.

The style of the Abbé de Saint-Pierre is heavy and obscure. He re-

¹² The first *Mémoire pour rendre la paix perpétuelle en Europe* was published in Cologne (by J. le Pacifique), 1712. The following year there was published in Utrecht (by A. Shorden) the *Projet pour rendre la Paix perpétuelle en Europe*, in two volumes. The edition of 1729, Rotterdam (D. Bemann), bears this pompous title: *Summary of the Project of Perpetual Peace, invented by King Henry the Great, approved by Queen Elizabeth, by King James her successor, by the republics and by diverse other potentates. Adapted to the present general state of European affairs, demonstrated as in general infinitely advantageous to all men born and to be born, and in particular to all sovereigns and sovereign houses.*

peats himself constantly, and here and there contradicts himself. From the many we give the following as an illustration: "The thing which makes an enterprise glorious (p. 438) is its apparent difficulty and great utility. Now, to most people this enterprise will seem rather difficult, and as for its utility no one will doubt that it might be very great to Christianity, especially to the sovereigns neighboring on Turkey. Its success would, therefore, be glorious. But I look only upon the broad aspect of the plan, and I assume that order prevails among the Christian sovereigns, which is my principal aim. And I have really spoken of this enterprise only in the interest of those who have the misfortune of being in close proximity to that Empire, being convinced that they will all the more eagerly seek the protection of Europe, of the European union; that they will look upon the latter as a distinct step to a universal crusade, incomparably more compact and better organized than any in the past." Just a little before (pp. 297-98) he had said: "If there can be any hope of ever organizing an offensive league to exterminate the Turks, a league sufficiently powerful and enduring, it can be brought about only after the establishment of Christian arbitration." And elsewhere (pp. 442-43) he declares: "So that I am no longer satisfied to say that this treaty (of permanent arbitration) is very feasible, that this establishment is very practicable, that it is quite possible; I now affirm that for reasons that have their being in the very nature of man himself, it is impossible that some day it may not be executed; the only uncertain thing about it is the time when it will be executed, and I dare say that this time is nearer than we think." In 1713 he had said (vol. II, p. 127): "The proposed union does not mean conciliation of the various religions, but peace between nations with different religions," and he was not opposed to the idea that the Turks also should enter into this union; and for very good reasons. "I doubt," he says (p. 178), "that the majority of the Princes of Europe would prefer to shoulder so great an expense in behalf of the Poles, the House of Austria, of Malta and of the Republic of Venice, than to receive the Turk in his present state into the European union."

No; so confused a mind is not of the kind likely to be followed and imitated by a man of the force and reach of Cardinal Alberoni. If not at Piacenza, the cardinal may yet have read at Parma, at Bologne or

at Rome, in his youth even, an anonymous but well-known work of the time, entitled *IDEA PACIS UNIVERSALIS INTER ORBIS CHRISTIANI*, etc. Is there any need of my dwelling on the fact that the cardinal was acquainted with the work of his compatriot Marin Sanudo, published by Bongars, early in the 17th century, and also with that of Vives, the friend of Erasmus and of Fr. de Vitoria?¹³ There is every reason to believe that a book, composed by the *Propaganda fide* "at the time of the last Polish war, after the death of King Augustus II," was not unknown to him, although it was kept "hidden away like a mystery" until 1733. It is entitled: *CORDIAL REMONSTRANCE AND EXHORTATION TRULY PATERNAL, (how it would be possible, according to the views of the Apostolic See at Rome, among the Christian Powers, not only to remedy those disorders which hitherto have ruined the States and the Peoples, but also to reestablish an indissoluble and enduring friendship, by which the reconciliation of the Catholic Princes, their temporal Felicity, their Power and Dignity could be not only largely increased, etc.)¹⁴* But, if in a general

¹³ See, L. VIVES, *DE EUROPAE DISSIDIIS, ET BELLO TURCICO*, Basilee, 1526.

¹⁴ This "exhortation" was published in various languages. The French translation is in the Archives of the Ministry of Foreign Affairs, fonds Rome, 1733-1736, supplement 17. Its conclusions (p. 9) deserve to be quoted. They are:

"I. It is known * * * that the Rhine separates the Gauls from Germany, and they were formerly separated until the Franks had crossed the Rhine and changed and even subjected the Gauls to their domination; this gave rise to those divisions which brought on discord upon discord, pretensions upon pretensions, one war after another, and it would be well, if for the purpose of reestablishing permanent friendship, each kingdom should be confined to its ancient boundaries and kept within them.

"II. The owners of these kingdoms must renounce, by solemn oath, in their own behalf and in behalf of their successors and heirs without exception, to all future pretension to this or that country, province or localities, to every other pretension and to any misunderstanding that might exist among them.

"III. * * * for the great advantages which the courts of France and Spain derive from the division, they shall, with all their forces, assist the Ducal House of Austria both against the sworn enemy of the Christian name and against the adversaries of the church and the renegades who have caused it such great harm in the wars of Italy (p. 13)."

The various countries of Europe are distributed among the different princely families. The Archducal House of Austria, aided by Russia and the other countries, must drive the Turks out of Europe, "recover the holy land, retake all the holy places and there enthrone the House of Lorraine" * * * (p. 15). Any manner of ruses are permitted against the Protestants. The German Empire by right of succession

way, he agrees with the ideas expounded therein, he departs therefrom, as can be easily shown, upon certain matters of the greatest importance.

Alberoni may have found the necessary encouragement in favor of his project in the annals of the Holy See. Numerous also are similar ideas we find in the collections of the manuscripts which have been preserved in the families of high Roman prelates, from the time the Turks appeared in Europe. And besides, was not the league, concluded in 1571, which put forever an end to the westward progress of Islamism, the work of a single man, Pope Pius V?

But, at that time, still other minds were busily occupied with these ideas. And although neither the *National Community* nor the *Society of Nations* had made much headway in the minds of the people in spite of the *Civitas gentium maxima* of Suarez, yet the circle of Christianity had expanded; it included again the Protestant peoples, and extended as well over the orthodox Oriental Church. As early as 1717, we find the confirmation of these new ideas in a dispatch from Bentivoglio, the Papal nuncio at Paris; it was published by Father Pierling, in his masterly work: *LA RUSSIE ET LE SAINT-SIÈGE* (vol. IV, pp. 427-428).

Among the thinkers, who in the field of these ideas may have exercised an influence upon Alberoni, we may point to W. Penn and his *Essay on the Present and future Peace of Europe* (1693), and to Leibnitz who considers the subjection of the Turks as the necessary condition for the general pacification of Europe. We may also add, that Cardinal Mazarin, the compatriot of Alberoni, was also in favor of pacifism, if we are to judge by the consideration he gave to a system of this kind which had been submitted to him by the mathematician and astronomer, must revert to the Archduke of Austria and his successors. It is necessary "above all to abolish the Diet of Ratisbon, which for the past century has governed jointly with the Emperor and which now dares to oppose him and to impose its laws upon him" etc.

As is seen, Droysen [HISTORISCHER BEITRAG ZU DER LEHRE VON DEN CONGRESSEN in the *Monatsberichte der Kgl. preus. Akademie der Wissenschaften zu Berlin* of the year 1869, pp. 651-675] is mistaken when he declares that this manuscript has not been published. We are not at all surprised to find that this treaty has been qualified as a "rather foolish piece of work," and its authors as "idle, rebellious and personal enemies of the court of Rome" (!) by King William I of Prussia and by his ministers, since it was directed against the Protestants. Manteufel is also mistaken in believing that it was inspired by the writings of the Abbé de Saint-Pierre.

Ismaël Bouillau.¹⁵ Grotius, on the other hand, complains that de Richelieu hated him simply because he was a friend of peace. Alberoni seems, moreover, to have lived up to the maxim, in accordance with which "we may learn lessons, but rarely find models in contemporary as well as in historical facts," which Napoleon expressed only a century later. On the other hand, it is impossible that with his wide and thorough education, the cardinal should not have known the rôle which international arbitration had played and the services it had rendered in the preceding centuries. And is it not a fact that in former times, questions that no one in our day would think of bringing within such jurisdiction were submitted to the decision of arbiters? There are numerous instances. At all times, within the history of diplomacy, even in the Middle Ages, we encounter arbitration treaties; and we know that the free cities and the little German and Italian principalities, and the Swiss cantons as well, had a large share in developing this custom. But we are less well informed regarding the important place which international arbitration occupied in the Scandinavian and in all the Slav countries. And Cardinal Alberoni was bringing nothing new to those countries when he proposed his Perpetual Diet at Ratisbon; he did nothing but adapt to the conditions as he saw them an institution which others before him had thought of.¹⁶

¹⁵ In regard to this movement, see my work *Deux Précurseurs français du Pacifisme et de l'Arbitrage International*, in *Revue d'Histoire Diplomatique*, vol. XXV, 1911, pp. 23-78; the various studies of E. Nys, as well as W. SCHÜKING, *Die Organisation der Welt*, Leipzig, 1909; F. LAGORGETTE, *le Rôle de la Guerre*, etc., Paris, 1906; S. M. MELAMED, *Théorie, Ursprung und Geschichte der Friedensidée*, Stuttgart, 1909. In regard to the Abbé de Saint-Pierre, see: E. GOUMY, *Étude sur la vie et les écrits de l'abbé de Saint-Pierre*, 1858; S. SIÉGLER-PASCAL, *les Projets de l'abbé de Saint-Pierre*, 1900; and especially: F. DROUET, *l'Abbé de Saint-Pierre, l'homme et l'œuvre*, 1912; W. PENN, *an Essay towards the present and future Peace of Europe*, Washington (The American Peace Society), 1912; F. P. CONTUZZI, *La questione d'Oriente dinanzi al Diritto Internazionale ed alla Diplomazia europea*, Macerata, 1882. In addition: E. DE RUGGIERO, *l'Arbitrato Pubblico in relazione col Privato presso i Romani*, Rome, 1893; G. VELIO BALLERINI, *Il Problema della Pace Perpetua*, etc., Turin, 1885; C. PHILLIPSON, *The International Law and Custom of ancient Greece and Rome*, two vols., London, 1911.

¹⁶ See: A. PILLET, *La Cause de la Paix et les deux Conférences de la Haye*, Paris, 1908; M. TAUBE, *Principi Mira i Prava v mezdunarodnih stolknoveniiah svednjih vjekov* (vol. II of his *Histoire des origines du Droit International moderne*, in Russian), Harkov, 1899; M. NOVACOVITCH, *Les Compromis et les Arbitrages Internationaux du*

IV

Before yielding the platform to Cardinal Alberoni himself for the exposition of his project, we will add, that the general European situation may at that time have seemed to him propitious, at least for the discussion of his ideas. The Austrian Pragmatic Sanction had been recognized by France. The rivalries between the Habsburg and Bourbon Houses, which for centuries had dominated the policy of Europe, were thereby appeased. Writing to Sinzendorff about this time, Cardinal de Fleury expressed himself in regard to the pacification of Europe. Besides, these ideas of the Prime Minister of France had been known as early as the first session of the Soissons Congress, that is to say, January 14, 1728. On her part, Russia was in perfect accord with these two great Powers, and it might not have seemed altogether absurd that a prince of the Church should attempt to suggest an international organization. In laying the project before his readers, the English translator refers to it as a "project intended for the welfare of Christianity which could only have been conceived by him who seems capable of governing the world"; this judgment is all the more striking because the policy of the cardinal, as Prime Minister of Spain, was combatted with especial energy by the English.

1st.—It is cruel, the cardinal says in the introduction to his project, to see Christian Princes, so jealous of their honor and so anxious to avenge even the suspicion of an injury; so easily roused against each other on account of a trivial incident, and yet remain insensible in the presence of the most outrageous affronts, violations, ravages and depredations of the infidels of Barbary and of Morocco. These brigands have repeatedly seized Spanish or Portuguese vessels, ravaged and plundered the shores of these countries, and carried away their subjects into slavery, and they have not been punished! Still these countries have waged long wars for some slight offense committed against the one or the other of their ministers! Other Princes and states condescend to pay tribute

XII^e au XV^e siècle (thesis) Paris, 1905; VESNITCH, *Le Droit International dans les rapports des Slaves Méridionaux au Moyen-Age*, in *Revue de Droit International et de Légit. Comparée*, 1896; and also the well known works of KOMAROVSKY, MÉRIGNHAC, etc.

and to send presents to these pirates to protect their subjects against these evils. In the judgment of the public, such conduct is not compatible with the dignity of free and independent Princes.

The author defends his project against the suspicion it may rouse on account of its religious nature, and declares that the opportuneness for this enterprise has never been so favorable. It seems that Heaven demands the overthrow of the Turkish Empire by a concurrence of circumstances such as have not been seen since the Mahometan doctrine first appeared in the world. To his mind, the conquest of the Turkish Empire is so easy at that time that nothing is wanting for its realization, except a close and disinterested union of the Christian Powers. If they were to let the excellent opportunity go by, posterity will justly accuse them of inexcusable remissness. And even if the Christian Princes and governments should escape censure in this world, they will have to give a formidable accounting of themselves before a tribunal which never errs.

Another indication of the divine will in the direction of this project seems to reveal itself in the peace and tranquillity of the Christian world; we have today large armies on foot, accustomed to the strenuous life and to the fatigues of war, and capable of greater feats. * * * The history of the Crusades likewise speaks in favor of this enterprise. In that history we behold Godfrey of Bouillon conquering Mesopotamia and Syria as well as a large part of Asia Minor within the space of three years and with less than two hundred thousand men; did not he and his successors rule at Jerusalem for almost a century? The Christians in Turkey will, of course, cooperate with great enthusiasm in this work, since in its success they will find release from Turkish slavery.¹⁷ This plan will also be favored by the uncertain and disordered state of the

¹⁷ One century before Cardinal Alberoni wrote his Project, a French consul who was passing through Belgrade wrote in a letter, dated January 25, 1624: "Since I came to Belgrade, I have of a sudden discovered that a League has been organized in Christianity to march against the Turkish State this coming Spring; I found letters written in symbols on the table of my host Ragnosky who plots the affair here * * * from which I learn that the Pope, the Emperor, the King of Spain, the Grand-Duke and Mr. de Nevers are in the enterprise * * * and that all Servia and Bosnia are to rise as soon as the League appears." See, A. BOPPE, *Journal et Correspondance de Gedoyen "Le Ture" Consul de France à Alep*, Paris, 1909, p. 47.

infidels, especially in Constantinople, where the passions of the people for a revolution are roused.

'My project,' so reads the text of the author, "is the result of long and sustained labor, and I may say without presumption * * * that it is built on the glory of God only, for it is inspired by the fervent desire to see the banner of Jesus Christ wave in the world of the infidels." To form such a project and to map out a plan in order to perpetuate peace in Christianity, may appear to many people a task that can not be realized; and because, of course, the difficulties must be very serious, he asks indulgence for the errors inherent in every grand design. To those of a hesitating nature who doubt whether the war against the infidels proposed by the project is justified, he answers that it suffices to state that the Turks do not possess a single foot of ground in the world but was acquired through sacrilege, imposture, violence, treason or oppression. And to reinforce this affirmation, he relates the history of the advent of the Turks in Europe as well as their conduct toward their neighbors and co-religionists, the Persians. "To conclude: there is no need to try to evade the reasons for undertaking a war against them, since the Christians have the right to recover what the infidels usurped in a way contrary to the rights of humanity, and because the Sultan on his coming to the throne takes the solemn vow to destroy Christianity." As we see, this is the same viewpoint which we have already met in P. Dubois, in G. Podebrad and in a number of Alberoni's predecessors. In our own time, his compatriot, F. P. Contuzzi, writes that Turkey in Europe is "a paradox, an anomaly, an anachronism" and that the question is not one of reforming her, but rather of taking her name off the list of European states!

2. Up to his time, Christian Princes have been killing each other, instead of forming into union against the infidels. And this was even true during the Crusades, when "all regard for religion disappeared when it came into conflict with political pretensions; again there awakened the spirit of dispute and discord, thwarting all praiseworthy projects and sometimes rousing the Princes against each other to such a degree of madness that soon they fell prey to the common enemy. Would to God that I might draw a veil over those melancholy times."

Against accusations of different kinds, for instance, that he had cen-

ceived this plan only in order to propagate the religion he professes, he declares in the most solemn manner that he does not follow an exclusively Catholic policy, since he places the interests of Catholic states on a footing of equality with the Protestant states. This equality is the first condition for the success of the project. The Turkish possessions are vast. He is far from believing that this extent of territory is a barrier against the proposed enterprise; he is on the contrary convinced, that nothing can be more helpful to further it, and in support of this assertion he adds: "The same cause has paved the way to the ruin of all the great empires in the world, especially to that of the Romans and of the Saracens." He makes reservations regarding the bravery of the Turkish army; the last war has besides destroyed this reputation "their large number has frequently had no other effect except to spread confusion and disorder in their ranks" and to lead them to defeat.¹⁸

The military enterprise must be carefully prepared.

3. The territorial partition must be agreed upon beforehand.
4. He draws up a plan of campaign worthy of the chief of the general staff of an army of that time, and gives evidence of extraordinary information regarding localities and strategic positions both on land and on sea. This information had been furnished him by an old soldier (Bernier) whom he had met in the train of the Duke de Vendôme and for whose ability he had the greatest admiration. He tells us "in 1730, I sent this man to reconnoiter all the important cities and all Turkish fortresses in Asia and in Africa, where he passed for a Mussulman and continued his investigations during three years." This entire portion of the project is commended to the attention of military historians. We can not, however, pass over in silence a very interesting observation of a political character. Alberoni insists that during the campaign no new taxes should be laid upon the conquered lands; more than that, no changes must be made in the fiscal policy applied to the Christians in Turkey; such action might cause them to wish that the Turkish

¹⁸ Some of these observations we meet in the writings of our contemporaries. Read for instance the following passages taken from the proclamation of General Camerana of June 16, 1912, to the Arabs: "The Italian victories follow one another. *This is a proof that God is forsaking the Turks. * * * Nothing on earth happens but according to the will of God.* Would the Italians be victorious, if it were not by the will of God?"

administration had not been changed, for it was a maxim with the latter never to make any changes in the system of taxation.

V

Defending himself against various accusations made against him to which we have already referred, the cardinal writes: "I shall have little difficulty in clearing myself from the imputation of bigotry. And I have reason to believe, that people know rather well that I am not versed in the science of casuistry and controversy. I have always felt that no other means should be resorted to to reconcile the varying views of Christians than those recommended by the scriptures, that is to say, gentleness, tolerance, godliness and purity of morals. And I am certain that the ministers of Protestant Powers who were accredited to the court of Spain during my connection with the government will do me the justice to certify that they have never known me possessed of any other sentiments. I was moreover so entirely opposed to persecution, that I urged the king repeatedly to grant freedom of conscience in his lands; and this was not all: I even dared to propose a plan for reducing the powers of the Inquisition, a fact which, I am sure, had not a little to do with my dismissal. I was so free from ultra-religious sentiments that during the last war in Hungary my adversaries accused me of favoring the Turks * * *. In the project which he presents to his contemporaries, the first thing to do, or "the first measure to take," is to assemble a Congress at Ratisbon, to which the Powers are to be invited in the name of His Imperial Majesty. A very characteristic point to be noted here, which is all the more striking because written by a prince of the Catholic Church, is the fact that this initiative is not only not entrusted to the Pope, but that the latter is left altogether out of the project, which does not even refer to the Pontifical State. This is again the more striking because his contemporary, the great philosopher Leibnitz, associated the Emperor and the Pope in this enterprise. Alberoni moreover insists upon the necessity of determining in this preliminary assembly the portions that are to be distributed among the Powers taking part in it, believing that such an arrangement is the first condition, on the one hand, for the success of the enterprise, and

on the other, for the pacific organization of Christian Europe. In this Congress, the following preliminary dispositions were to be decided:

- (1) The religious question within the Empire of Constantinople must be settled on the basis of the Peace of Westphalia, without prejudice to the rights, to the doctrine or to the rules of the Greek, Copt or Armenian Churches;
- (2) A general customs tariff, without distinction or special privileges in favor of any nation, shall be agreed upon for all the Christian Powers;
- (3) No prince nor any state shall claim sovereignty over the Archipelago; this will greatly contribute to the development of commerce and prevent disputes between merchant flags;
- (4) The fortifications along the Dardanelles must be demolished;
- (5) The *dominum maris* of the Emperors of Constantinople shall be limited to the straits of Gallipoli.

It is only in the interest of general peace that he attempts to limit the powers and sway of the Emperors of Constantinople. "The world has many reasons to complain of the excessive power of certain princes, since oftentimes this power has been employed only for the purpose of furthering their inordinate ambition and shameful purposes. It is, therefore, prudent to foresee all possible measures, in order to forestall in every prince an excess of power which might render him dangerous to his neighbors. It is really to be hoped," he continues, "that our plan of a Perpetual Diet for insuring the tranquillity of Christianity will produce the desired result. But it is difficult to guard sufficiently against future events: there is a strange rotation in the course of sublunary affairs. Nothing is more variable than political systems; do not princes who, for many years, have been in complete discord rush into each other's arms in consequence of some new influences and speculations, and do not these same princes congratulate each other upon things which in other days had been the source of much bloodshed? It is not impossible, therefore, that the new Emperor or his successors may not at a given moment have views that are not in harmony with the general interest of Europe. This power can, therefore, not be curtailed too much." The Perpetual Diet of the Christian Powers must be clothed with the authority to settle amicably all disputes and controversies. "If such a tribunal had already been established in Christianity, we

should not have seen Europe so frequently harassed by unreasonable and unjustified wars."

Finally, we come to the quintessence of his reflections and propositions:

I. In future there shall be a Perpetual Diet, composed of the ministers or deputies of all Christian Powers. It shall meet at Ratisbon under the rules and forms of procedure actually in use in the Germanic Diet.¹⁹

II. All controversies that might arise between the Princes or Christian States on account of religion, succession, marriage or for any other reason or pretext whatever shall be settled by the number of votes required by the constitution of the Empire. These decisions shall be rendered within the period of one year, reckoned from the day on which the affair is submitted to the Diet.

III. In case one of these Powers in litigation should refuse to submit to the decisions of the Diet, which must be notified in authentic form within a period of six months, such Power shall be held to be a disturber of public tranquillity, and the Diet shall proceed against it by military execution until it submits to its decisions and makes compensation for all war damages and expenditures incurred for this purpose. The contingent to be furnished by each Prince or State in such an event shall be regulated on the basis established for the Empire.

Alberoni wisely adds: "Time alone will show what fate awaits my intentions and wishes. But any intelligent man will be able to realize the difficulties I had to overcome in order to give consistent form to such a plan."

In limiting the Diet to Europe or to the Christian world, Alberoni

¹⁹ The Diet of Ratisbon was divided into three Colleges: the College of the Electors, consisting of the nine sovereigns, to whom belonged the right to fill the vacancy on the Imperial throne; the College of the Princes, of a membership not less than one hundred; and the College of the Free Cities, composed of fifty-one deputies. The voting took place in the order in which the three Colleges are here given, so that the two princely Colleges decided all resolutions by themselves. DUC DE BROGLIE, *Frédéric II et Marie Thérèse*, Paris, 1883, I, p. 254. — The place of the first session of Penn's Parliament (*Imperial Dyet or State of Europe*) should be central, as much as is possible, afterwards as they agree. Penn finds the model for this institution in the States-General of the Netherlands.

proved himself thoroughly imbued with the spirit of the great ideas of his time.

On the other hand, peace and fraternity constitute the foundation of the Christian religion, born of the Roman soil when in the eyes of the civilized world Rome had become a universal state. Therefore, if Alberoni seeks the model for his organization and for his pacification of Europe in the constitution of the Holy Empire, this means only the adaptation of the principles of Roman law to the Germanic genius. Roman peace, Christian peace, Germanic peace, "Alberonian" peace, all these are only the successive links in the evolution of the same idea. And if "utopia is only the ideal seen in the distance," we may take comfort because, while the distance hitherto covered has been long and rugged, the dawn espied by so many keen-eyed minds has become brighter already, much brighter than it was a few centuries ago. The son of the Piacenza gardener, it will be found, has contributed to this progress. And while there remain always traces of even the slightest calumny, yet, the great judge time has accomplished his work also: little blemishes disappear, and the things of real worth are left. But a few years after the death of Alberoni, Ange Godard in his turn writes a *PROJET DE PACIFICATION GÉNÉRALE* (Amsterdam, 1757), solely designed for the peace of Europe and in favor of the establishment of the universal republic, for the purpose of the conservation of mankind, on whose behalf he already bespeaks "a public international law." Like a ray of the sun, it may be obscured, denied, outraged; but in the end it reappears and dispenses justice to all sides, even as the sun's ray sheds light upon life.

In vain did Toulouse from Pierre Dubois, and Venice from Crucé, and Berne from the Prince de Hesse-Rheinfels, and Rome from Leibnitz, and Ratisbon from Alberoni await the organization of an international arbitration tribunal. But on a glorious morning it awoke at The Hague. It is not yet the ideal tribunal. But it looks very much like it. Real progress is an evolutionary process of a slow but sure growth. The contribution which Cardinal Alberoni has made to the construction of that institution is neither very considerable, nor very remarkable. It bears only the marks of the tools which fashioned it and the seal of its author. I thought, however, that it was worthy of presentation to the minds

of those who are following with interest the steep path humanity is engaged in ascending, in the effort to do away with brutal force and to establish the reign of Law and Justice.²⁰

MIL. R. VESNITCH.

²⁰ While this article is going to press, the partition of Turkey is being effected, at least in regard to her European and African provinces. It is not the Western Powers which are realizing this idea of Alberoni; rather, it is the vital forces of the Balkan peoples, subjugated five centuries ago by the Asiatic invasion, which are achieving this superb work, by taking up again, as it were, the thread of their development at the very place where it was severed at the end of the 14th century, after the memorable battle of Cossova. We shall not, however, blame our author because he did not foresee that in future the peoples and their aspirations would replace the intrigues of the Cabinets. This mistake in judgment was not at all personal to himself; it was general and was relegated to the historical archives only by the declaration of independence of the United States of America and by the consequences of the great French Revolution.

CARDINAL ALBERONI'S SCHEME
FOR
REDUCING THE TURKISH EMPIRE TO THE
OBEDIENCE OF CHRISTIAN PRINCES:
AND FOR A PARTITION OF THE CONQUEST
TOGETHER
WITH A SCHEME OF PERPETUAL DYE^T
FOR ESTABLISHING THE PUBLICK TRANQUILITY

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THE TRANSLATOR'S PREFACE

The following Scheme requires no other Recommendation, but to say, it was design'd by Cardinal Alberoni, a Genius form'd by Nature for the greatest and most extensive Enterprizes.

Posterity will scarcely believe, that this *Prodigy*, in the space of four or five years, had raised the Spanish Monarchy to the Height of Power, to which it is now arrived; and that, from a languid and declining State, which render'd it an Object of Contempt to the rest of Europe, for more than a Century.

Should I engage in a Detail of his Administration, and Conduct in Spain and Italy, this work would swell to an exorbitant Size; but that is not my Design, having entirely confin'd myself to the Business of the Translation, which I have endeavour'd to perform with the utmost

Fidelity; and it would, indeed, be almost unpardonable to have committed Errors, in a Scheme, calculated for promoting *Christianity* and the Good of Mankind, which could be portray'd by him only, who seems to have Capacity for the Government of the World.

As this Design interests the Religious as well as the Civil Rights of all Christian Powers, I flatter myself, it will be esteem'd as a valuable Present to the Publick.

THE INTRODUCTION

If neither the Dictates of Humanity, nor the Duties of Religion are cogent enough to inspire the Princes and States of *Christendom* with a Resolution to rescue their Fellow Christians from the Tyranny and Bondage of Infidels, it may however be presumed their own Interests will tempt them to undertake that pious and salutary Work.

It is amazing to see *Christian* Princes, so jealous of their Honour, so anxious to revenge the very Shadow of Injuries; to see them, I say, so easily piqued at one another, upon trivial Incidents, and tamely sitting down, at the same Time, with the most outrageous Affronts, Violations, Ravages, and Depredations of the Infidels of *Barbary* and *Morocco*. How often do those Robers take the Ships of *Spain* and *Portugal*, ravage and burn their Coasts, and carry away their Subjects into Slavery, with Impunity? Yet these Crowns have, for some Time, been in a State of Warfare, on the Score of Insults offer'd to a Public Minister.

Other Sovereign Princes and States, to preserve their Subjects from such Evils, stoop so low, as, in some Measure, to become Tributary to those Pyrates, by sending them annual Presents; but how far such Conduct is consistent with the dignity of free and independent Princes, is submitted to the Censure of the Publick.

Some Umbrage may, perhaps, be taken against this Scheme, on Account of Religion; but how often have Catholick and Protestant Princes enter'd into Confederacies against their Neighbours indiscriminately? And shall we now be surprized to see them forming Alliance against Infidels and Pyrates?

Never was Opportunity more favourable; Heaven seems to point out the Subversion of the *Turkish* Empire, by such a Concurrence of Incidents, as has not been known, since the Doctrine of *Mohomet* first

appear'd in the World: A Juncture that exceeds the Wishes of the most ardent *Christians*; when the *Turks* are so vigorously pushed by the *Per-sians*, that the *Turbant* trembles upon the Head of the Arch-Infidel.

The Conquest of the *Turkish Empire* is, at this time, so practicable, that nothing is wanting to effect it, but a close and disinterested Union amongst *Christian Powers*; but should they neglect this kind Opportunity, Posterity will have just reasons to charge them with the most unwarrantable Supineness: But whatever Censures they may undergo in this Life, it is to be fear'd, they will have a formidable Account to make for their Indolence before a Tribunal that cannot err.

The perfect Calm and Tranquility in *Christendom*, seems to be another Indication of the Divine Will; there are now great armies on foot, inur'd to the Fatigues and Toils of War, and capable of performing the greatest Exploits.

There are other Motives to animate the *Christians* in this Undertaking, and to convince some timorous People, that the Force now proposed will be sufficient to accomplish it.

The History of the *Cruzadas* will soon undeceive them; there they may observe, that *Godfrey of Bouillon*, with less than two hundred thousand Men, conquer'd *Mesopotamia, Syria*, and a great Part of the lesser *Asia*, in the space of three years; and that he, and his Successors had enjoy'd the Kingdom of *Jerusalem* for near a *Century*.

The great Number of Christians dispersed thro' all Parts of the *Turkish Dominions*, must be consider'd as another Incentive, since we may conclude, they will co-operate chearfully in all Measures consistent with their Security, for throwing off the *Turkish Slavery*.

The present mutinous and unsettled Disposition of the Infidels, especially at *Constantinople*, will prove highly advantageous to our Design; in spite of all the Artifices, Intrigues, and Donatives of the *Ottoman Court* on one Hand, and the most exquisite Punishments on the other; yet such is the violent Passion of the People for a Revolution, that it discovers itself more and more every day.

These Sheets are the Result of long and continued Labours, and tho' it would be Presumption to say, the scheme now proposed to *Christian powers* is not susceptible of Improvement, yet this I have the Courage to affirm, that it is founded upon no other Motives, but the

Glory of God, and a fervent Desire of displaying the Banners of *Jesus Christ* in the Infidel World.

To form a Project of conquering the vast Empire of *Turkey*; to unite the several Powers who are to accomplish it, who may have all different interests and Expectations, to devide the Conquests; to delineate a Plan for perpetuating the Tranquility of *Christendom*, is a task that may seem to be invincible to many; and as the Difficulty must be allow'd to be very great, I flatter myself with the Indulgence of the candid Part of the World, for such Errors as will always attend great Designs.

Some, perhaps, may be scrupulous enough to doubt, whether a War against the Infidels be justifiable upon this Scheme; but to obviate all Objections of that Kind, it will be sufficient to say, the *Turks* are not possess'd of one Foot of Ground in the World that was not acquir'd by *Sacrilege* and *Imposture*, by *Violence*, *Treachery* and *Oppression*.

Their first Acquisitions in *Europe* were owing to the most execrable Perfidiousness.

John Palaeologus, Emperor of *Constantinople*, craving their Assistance against some *Grecian* Princes, with whom he was at Variance, had soon Reason to bewail his Error; for after the Barbarians had brought those Princes to Reason, they possessed themselves of the whole Country.

Emanuel Palaeologus, his successor, fell into the like Mistake; that unwary Prince concluded an Alliance with the Tyrant *Bajazet*, but it produced no other Effect but to give him the better Opportunity of besieging *Constantinople*, without any other Pretence but Ambition; and the Place must certainly have fallen into his hands, had not the Approach of *Tamerlane* prevented it.

There is no Occasion to have Recourse to Antiquity for Examples of the Turkish Perfidiousness; it is not many years since they siezed upon the *Morea*, in a Time of profound Peace, without the least Umbrage of Right.

But of all the glaring Instances of Treachery in the Histories of Mankind, there is nothing can parallel that of the *Turks* invading some years ago the *Persian* Territories, at a Time that unhappy Country was agitated and oppressed with intestine War and Rebellion; for in lieu of offering their mediation towards terminating the Differences that gave Birth to those Troubles, they seized upon the best Provinces of the

Persian Monarchy, without any Declaration of War, or any Pretence of Injuries.

There was but one Person in their *Divan*, that had virtue enough to oppose that atrocious Invasion, as unworthy and base, but all Reasoning was ineffectual.

The Divine Vengeance has since justly pursued that accursed Nation; the injust and tyrannical Invasion of the *Persian* Dominions has been the Source of their present Calamities; and it is very probable, that as Treachery gave the first Settlement of the Power of the *Turks*, so it is in a fair Way of putting an end to it. But to conclude this Topick; there can be no room to hesitate about the Motives for a War against them, since the *Christians* must be allow'd to have a Right to recover what the Infidels usurp'd contrary to all the Rights of Mankind, and that every *Sultan* upon his Inauguration makes a solemn vow to destroy *Christianity*.

THE SCHEME
OF
CARDINAL ALBERONI, ETC.

PART I

Nothing has afforded more just grounds of Complaint, and Grief to all good meaning Christians, than to behold the Princes of *Europe*, carrying on, unnecessary, and often, unjust Wars against one another, and shedding Streams of *Christian* Blood, in pursuit of imaginary Glory, or trifling and inconsiderable Conquests and frivolous Pretences, whilst the inveterate and profess'd Enemies of Christianity are Masters of several large and flourishing Provinces and Kingdoms, in *Europe* and *Africa*, and are Lords of, almost, all *Asia*.

Whoever would reflect with a *Christian Eye*, upon the supine and preposterous Conduct of Christian Powers, must be inclinable to think, they have been infatuated, or abandon'd to a State of Indolence, that will amaze all Men capable of making Reflections: For to imagine, that one *Christian* Prince should make War upon another, on the Score of some small Territory or Spot of Ground, when with the same force and expence, he might conquer large Kingdoms from Infidels, is shocking

and will scarcely gain Credit in distant Periods of Time; but the Children of this Generation can bear Testimony of the Calamities, which the Ambition of some *Christian* Princes, and the Obstinacy of others, have created in the World: What Ravages have we seen in *Germany*, in *Flanders*, in *Italy*, *Spain*, and *Portugal*, *Poland* and *Sweden*? What countries pillag'd and destroy'd, what cities burnt and laid in Ashes?

Had those Arms, employ'd by *Christians* in destroying one another, been turn'd against Infidels, what Glory must result from such Atchievements to Christianity, and what Advantages to Christian Princes?

Had *Lewis XIV.* sent those great and formidable Armies that raised so much Terror amongst the Princes of *Europe*, to conquer *Barbary*, and destroy the Pyrates of that Country, which disturb the Commerce of the World; he would then have had an indisputable Right to the Title of *Most Christian*: But it may not be proper to proceed any further on this Topick; this, however, may be offer'd, that Temporal Views, Ambition, or Revenge have been the great *Arcana*, that have given *Motion* to the Designs of Christian Princes, tho' Religion has often been ensnaring Pretext.

It is to the same Spirit we must impute the Miscarriage of all the *Cruzada* Expeditions that were undertaken some Ages ago by *Christian* Princes against the *Saracens* and *Turks*; for tho' it must be granted, that *Christian Zeal* was the principal Motive to those pious Enterprizes, yet we must acknowledge with the greatest Regret, that all Regard for Religion disappear'd whenever it fell into Competition with worldly Expectations and Dominion: Then arose the Spirit of Dissention, which disconcerted all such laudable Projects, and, sometimes, animated those Princes against one another to such a Hight of Madness, that they became a Prey to the common Enemy.

Would to God, I could draw a Veil over those melancholy Times, but they will, however, be so far instructive, as to point out to us the Consequences of the selfish and imprudent Behaviour of Those Princes which may teach such as embark in the present Design, to avoid the Rocks that proved so fatal to their Predecessors.

I am well apprized, some will tax me with having Views of Gain, or particular Advantages in proposing this Scheme.

Others again, that it is contrived to no other End, but to propagate the Religion I profess.

But I declare in the most solemn Manner, that I am actuated by no other Motive, but that of propagating the *Christian* Religion, without the least Expectations of any worldly Profit, or any Byass towards the Communion of which I am a Member, which shall be demonstrated in the Sequel of this Essay, it being proposed to place the *Protestant* Interest upon the Equality with that of the *Catholicks*.

It will prove an easy Task for me to remove such prejudices, since those who are acquainted with my Life and Manners, are so just to acknowledge on all Occasions, that Wealth was never my Idol; and I can appeal to my own Conscience, there is nothing in Use amongst Men, more contemptible to me.

Were I a Man that delighted in Gain, few had more Opportunities of amassing Riches, when the Duke of *Vendosme* honoured me with his Confidence in the Wars of Italy, I was in some Measure, his Treasurer, he often rallied me in the most agreeable Manner, for contemning Money, saying, he believed, *I would never take much Pains to find the Philosophers Stone*.

My Station in *Spain* gave me an Opportunity of making immense Acquisition, but I never made Use of any greater Sums, than were necessary to support the Dignity of a Minister; and to obviate all Jealousies of growing rich at the expense of the Publick, I would suffer none of my Relations to come to me.

I shall have as little Difficulty to acquit myself from the Charge of Bigotry; I believe it is pretty well known, that casuistical or controversial Learning is not my Talent: I have been always persuaded, that there should be no other Expedients for reconciling the different Opinions of *Christians*, but such as are recommended in the Gospel, that is, Meekness, Forbearance, Sanctity and Purity of Manners; and I flatter myself, the Ministers of the *Protestant* Powers, who resided at the Court of *Spain*, during my Ministry, will do me the justice to acknowledge, they never discovered any other sentiments in me; and I was so far prejudic'd against Persecution, that I often advis'd the King to grant Liberty of Conscience; but that was not all, I even ventured to propose a Scheme for moderating the Power of the Inquisition, which, I am thoroughly

persuaded, did not a little contribute to my Fall: And so far was I from any Imputation of an exorbitant Zeal for Religion, that my Enemies charged me with favouring the *Turks*, in the last *Hungarian War*, by advising the King to attack *Sardinia* at that Time.

Having now, I hope, removed Prejudices, purely notional, I will proceed in delineating the Plan of reducing the *Turkish Empire* under the Dominion of *Christian Powers*.

This will, no Doubt, appear to some, at first View, not only impracticable, but even impossible; but, I am convinced, it will prove an easy Labour, if the Princes and States of Christendom will lay aside their Animosities and Ambition, and embark in this glorious Expedition, upon the Principles of Religion and Humanity only; but should it be attempted upon any other Foundation, it will infallibly prove abortive.

It must be acknowledged, the *Turkish Dominions* are very great, but I am so far from thinking, that Extant of Country will be a Barrier to them, that, on the Contrary, I am persuaded, nothing can tend more effectually towards facilitating the present Design.

The same Cause prov'd the Way to the Ruin of all the great Empires in the World, particularly that of the *Romans*; for being necessitated to send their Forces to the distant Provinces, either to repel Foreign Enemies, or to suppress Domestick Commotions, they enervated the Center of the Empire, which for that Reason, fell into the Power of the Barbarous Nations.

Extent of Dominions proved no less fatal to the *Saracens*, and there is the strongest Reasons to think, their Successors will not be more fortunate with their mighty Kingdoms: But we must observe this Difference between the Condition of the *Romans* and that of the *Turks*, that the Reputation, Discipline and Valour of the former had render'd them formidable in all parts of the then known World, whereas all the Successors of the latter were owing to their Numbers only, or rather, to the *Dissentions of Christians*.

The Reputation of the *Turkish Arms* was never established amongst *Christians*; but if ever they had any Pretensions to it, the Success of the last War in *Hungary* must convince them, that it was ill founded: There, the Germans, under the Prince of Savoy, vanquished the Infidels in two signal Engagements, in spite of their Numbers and other Advantages;

that of *Belgrade* can never be enough celebrated; there the *Turkish Army* was twice as numerous as that of the *Christians*, which they had, in a manner, besieged in their Camp, they were, however, routed, and the Place taken with a Garrison of twenty thousand men: So that it may be laid down as a Maxim, that any Army of *Christians* well disciplined and commanded by a General of Reputation, will always conquer a *Turkish*, except their Disproportion be very great; for their Numbers have often produced no other effect, than to enhance their Confusion and Disorder.

The *Spahies* of Horfe, were always despised in the Christian Armies; the Reputation of their *Corps of Foot*, call'd the Janizaries, is much better; their Number amounts to about Forty Thousand, and are, for the most part, the Tribute Children of Christians: But it is very certain, that their Military Spirit has been in a declining State since the Battle of *Vienna*, in which *Sobieski*, King of *Poland*, acquired immortal Honour; and under Heaven, it is to his Valour and Conduct that *Europe* is indebted for the Enjoyment of the *Christian Religion*.

But nothing can exhibit a more contemptible Idea of the Turkish Valour, than the present War against the Persians, a People that even their Enemies always despised, yet they have often routed them in the Course of this Quarrel, and seem to be in a Condition of conquering all their Dominions in *Asia*: And this at a Juncture,¹ when the *Turks*, having no other Quarrel upon their Hands, united all their Forces.

If the *Persians*, then, who were always contemptible in War, as well as amongst *Christians* as *Turks*, can obtain such victories, at a Time when the whole Military Power of their Enemy is employed against them, it will be no Paradox to say, our Design will meet with few Obstacles, the *Turks* having already lost the Flower of their Troops, and their most experienced Officers in the *Persian War*.

Having now, in some Measure, demonstrated the Facility with which the Turkish Empire may be subverted, we will endeavour to portray the Repartition, as well of the Naval, as the Land forces, and of the several Princes and States that are to co-operate in this Grand Enterprise.

The first step to be taken, is, to appoint a Congress at *Ratisbon*, to

¹ This was wrote before the March of the Russians to Asoph.

which the confederate Powers are to be invited in the name of his Imperial Majesty.

There an Alliance is to be enter'd into for the Conquest of the *Turkish Empire*; in which the Quotas of each are to be adjusted, together with a Partition of the Conquests, and Equivalents in favour of such Powers, as may Prefer an accession of Territory near their ancient Dominions, to any distant Acquisitions; and a Plan of the Military Operations, of all which I have attempted the following Schemes.

PART II

I. That a Military Chief be established at *Venice*, as being near the Theater of War, as well by Land as by Sea.

II. That the Emperor and the Germanick Body shall raise an Army of one hundred thousand Men, to be commanded by his Imperial Majesty, or his Captain General.

III. That her *Czarian* Majesty shall act against the *Tartars* with an Army of one hundred thousand men.

IV. That the Kings of *Poland*, *Denmark*, and *Sweden*, shall raise an Army of fifty Thousand, *viz.* 30,000 Poles, 10,000 *Danes*, and 10,000 *Swedes*.

V. That the Kings of *France*, *Spain*, *Sicily*, *Portugal* and *Sardinia*, the republics of *Venice* and *Genoa*, the Cantons of Switzerland and the *Grison Ligues* shall raise an army of one hundred and twenty thousand Men in the following proportions:

<i>France</i>	30,000
<i>Spain</i>	20,000
<i>Naples</i>	10,000
<i>Portugal</i>	10,000
<i>Sardinia</i>	10,000
<i>Venice</i>	10,000
<i>Genoa</i>	10,000
<i>Swiss and Grisons</i>	20,000
	120,000

Repartition of all the Land Forces to act against the Turks

His Imperial Majesty and the Germanick Body.....	100,000
Her Czarian Majesty.....	100,000
The Kings of <i>Denmark, Sweden and Poland</i> fifty thousand, viz:	
Denmark	10,000
Sweden	10,000
Poland	30,000 50,000
The Kings of <i>France, Spain, etc.</i> , one hundred and Twenty Thousand, viz.:	
France	30,000
Spain	20,000
Naples	10,000
Portugal	10,000
Sardinia	10,000
Venice	10,000
Genoa	10,000
Swiss and Grisons.....	20,000 120,000
Total of all the Land Forces.....	370,000

Let us now proceed to make an Estimate of the Naval Forces necessary for this Undertaking, which I think should be no less than an hundred ships of the Line, from fifty to seventy Guns, and a proportionable Number of Frigates, etc. together with a Fleet of one hundred Galleys and Galasses.

Repartition of the Naval Force

	Ships of the Line	Frigates
England to furnish	30	10
Holland " "	20	10
France " "	10	5
Spain " "	10	5
Naples " "	5	0
Portugal " "	10	5
Venice " "	10	5
Genoa " "	5	0
	100	40

Here it will be necessary to obviate an Objection that may be made, with regard to the Disproportion between the Quotas of *England* and *Holland*, and those of the other Confederates.

But there will be nothing further to be offer'd on this Head, but that as those Powers are exempted from contributing towards the Land Armament, it is equitable that they should make up the Deficiency by extraordinary Efforts at Sea.

Repartition of the Fleet of Galleys, etc.

France	10
Spain	10
Naples	5
Sardinia	5
Venice	50
Genoa	10
Tuscany	5
Maltha	5
	—
	100

As the King of Portugal has no ships of that Structure, it is proposed that his Portuguese Majesty shall supply the Fleet of Galleys with Hospital Ships and Tenders, which will be pretty near an Equivalent for his Quota.

Besides these Squadrons, it will be necessary to equip another, to block up *Algier*, *Tunis* and *Tripoly*, which being Tributary to the *Sultan*, are obliged to send him Succours on all Emergencies: This Squadron to be fitted out at the expence of the Crowns of *France*, *Spain* and *Portugal*; it being proposed that those places shall be put into their Hands as soon as conveniently may be, after the conquest of the *Turkish Empire*.

The Reason that has induced us to fix the Proportion of the *Venetians* at Fifty *Galleys* or *Galleasses* is, that they have a great Number of such Vessels, and that they can equip them with great Expedition; to which we must add the signal Advantages allotted to them in the event of the War.

Having now endeavoured to adjust the Sea and Land Armaments necessary for this Undertaking; it will be proper, in the next Place, to settle the following articles in the Congress relating to the partition of the Conquest, and other Heads.

Some will perhaps object, that a Partition would be more natural after the Conquest than before.

To this we must reply, that it is otherwise in all Treaties for carrying on offensive Wars, and with Reason too; for should little Princes and States have no Certainty with regard to their Expectations, 'till the Conclusion, it is to be fear'd, they would find themselves then in a very disadvantageous Situation; and we may say, the ill Success of the Holly Wars was chiefly owing to the neglect of settling Preliminaries before they were begun: And to prevent the like Destiny, we have proposed the following Division of the *Turkish Empire*.

Here I acknowledge myself at a loss, and embarrass'd: To conquer the *Turkish Empire* is, in my Judgement, an easy Labour, upon the Plan proposed; but to devide it, amongst such a Number of Potentates, to the Satisfaction of each, is almost insuperable; however, as I have hitherto waded thro' a Sea of Difficulties, I will run the Risque of attempting a Sketch of the Knotty Work.

PART III

PARTITION OF THE TURKISH EMPIRE

The Duke of *Holstein Gottorp* to be declared Emperor of *Constantinople*, with all the Titles, Prerogatives and Pre-eminencies enjoy'd by the last Emperors of *Constantinople*, except in such Particulars as are alter'd by this Partition.

All the Turkish Dominions in *Asia* and *Africa*, with the Provinces of *Romania* in *Europe*, to be annexed to that Empire, except as hereinafter is declared.

That the Order of Succession be Hereditary in his male Descendants only.

As this vast Design could not be attempted without the Influence and Power of the August Emperor of the Romans, and as this Illustrious

House has been always the *Rampart* of the *Christian* World against the Attempts and *Invasions* of the *Mohometans*, it is proposed that all *Bosnia, Servia, Sclavonia, Macedonia* and *Wallachia*, be yielded to his Imperial Majesty in Propriety; and to be under the same Provisions, Dispositions and Rule of Succession with the Hereditary Countries, as settled by the *Pragmatick Sanction*.

His Imperial *Roman* Majesty is likewise to have Precedence of the Emperor of *Constantinople*, and all other *Christian* Potentates.

The Dominions of her *Czarish* Majesty being already of great Extent and as that extraordinary Princess has given the most shining Proofs, that publick Liberty is her principal View, with a seneere Desire of Propagating Religion, we have the greatest Reason to conclude, she will look upon the Conquest of Asoph and *Tartary*, as a reasonable compensation for her pretensions to the new Conquests; and that she will acquiesce with the Restitution of her Part of *Finland* to the Crown of *Sweden*, as an expedient that will conduce very much towards preserving the Tranquility of the North

As the Territories of France are large and flourishing, and as his Most *Christian* Majesty has given invincible Testimonies in the course of the last War, that he is not actuated with the Spirit of Ambition, it is presumed he will be contented with the Cession of Tunis, and the Glory of having so great a Share in Subduing the inveterate Enemy of *Christianity*.

And to reward the Zeal of his *Catholick* Majesty, of which he has often given signal Proofs in Africa, it is proposed the Confederates shall put him into Possession of *Algier*.

And as his Portuguese Majesty has always been animated with the like pious Intentions, it is proposed to give him *Tripoli*; nor must it be forgot, that his Ancestors had often signalized themselves for the Faith, against the Infidels of that Country.

As the Maxims of Great Britain, being a trading country, will not permit her People to enlarge their Dominions, it is proposed to give his *Britannick* Majesty the Island of *Candia*, and the City of *Smyrna* in Propriety; nor must we pass it over in Silence that no Princes were more zealous in promoting the Cause of Religion in the Holly Wars, than two valiant Monarchs of England.

And as the States of Holland may be view'd in the same Light, the Island of *Rhodes*, with the City of *Aleppo* will, we presume, quadrate with their Affairs and Expectations in the *Levant*.

In order to do justice to the Merit of his *Danish* Majesty, and as none of the *Turkish* Conquests seem to be suitable to the Situation of his Dominions, the Dutchy of Holstein-Gottorp seems to be much more advantageous to his *Danish* Majesty, to which the present Possessor is to renounce all his Right, and to all his other Territories in Holstein.

And as distant Territories can produce but small Advantages to the Crown of *Sweden*, it is reasonable to think a Restitution of the *Russian* Part of *Finland* will be a better Equivalent with the establishment of the Crown of *Sweden* in the House of Hess-Cassel, to which the Duke of Holstein Gottorp is to renounce all his Right. And it is hoped this Expedient will prevent Quarrels which might, one Day or other, be dreaded from the Pretensions of that Prince to the Crown of *Sweden* and the Dutchy of *Sleswick*.

It is for the same Reason that it seems necessary to add *Tuskany* to the Dominions of his Sicilian Majesty, who has already given the World Earnests of his Wisdom and Valour.

His Sardinian Majesty having an uncontroulable Title from his Ancestors to *Cyprus*, Justice demands it loudly for that young Hero, descended from a Race of Princes that were often celebrated for their va'lour against the Infidels; and in Regard to his Conduct and Magnanimity in carrying on the present Design, it seems to be highly reasonable to reward him with the *Milanese*.

As the *Prussian* Majesty is blessed with great and flourishing Dominions, and as he has always discover'd the warmest Sentiments for the Publick Good, the great and fertile Island of *Negropont* will prove a valuable Addition to his *Prussian* Majesty's Territories.

The House of *Bavaria* has always deserv'd well of the Christian World, and particularly in the Person of his late Electoral Highness, at the Siege of Vienna; it seems therefore agreeable to the Dictates of Justice, to enlarge the Dominions of that House with the Kingdom of *Bohemia*, which will put an End to all the Pretensions of his Electoral Highness, to the other Hereditary Dominions of the House of *Austria*.

The Kingdom of *Poland* having been, for many ages, as a Rampart

to *Christendom*, and as that unhappy Country has been a Scene of War or other calamities, for near forty years, it is proposed, in Consideration of their Efforts in supporting this Scheme, to make them a Cession of *Moldavia* and all the Country of the *Budziac Tartars*; and that the Crown shall be declar'd hereditary in the House of Saxony, as the only Remedy that can prevent those Evils, that will inevitably attend all their future Elections, which nothing can enforce more effectually, than the Remembrance of the War which has lately deprived Europe of so much *Christian Blood*.

The Republic of Venice has a Right to the tenderest Consideration of *Christians*, being one of their Barriers against the Infidels, and being the First Power of Christendom that lies the most exposed to their Fury. And as she has been tyrannically dispossessed of several Territories, without any other pretext but such as is generally suggested by Violence and Power, we presume all the Confederates will chearfully grant her all *Dalmatia*, and restore the *Morea* which was torn from her about twenty years ago.

The Republic of *Genoa* has often made signal Efforts against the Enemies of the *Christian Faith*, from whom they receive daily Injuries in their Commerce: And as her Territories are very inconsiderable, and her Affairs in a declining state, Equity, no doubt, incline the Confederates to give her that part of Greece now called *Livadia*, and to establish her Sovereignty in *Corsica*.

The Pretensions of the Knights of *Maltha* may be easily adjusted; Glory has been always their own View, and as it is that alone that has supported them for so many generations against the exorbitant Power of the *Turks*, so we have Reason to believe they will search after no other Rewards but the satisfaction of contributing to the Fall of the common Enemy.

As the Cantons of *Switzerland* and the *Grisons* can have no Views of extending their Dominions, it is presumed double Pay for their Troops, during the Continuance of the War, will answer their Expectations.

That all the Islands in the *Archipelago* not specified in this Partition, be reserv'd for such young Princes, and Generals, as shall be most distinguished in the course of the War.

The following Preliminaries must be likewise settled in the Congress

I. Religion to be established in the *Empire of Constantinople*, upon the Foot of the Peace of Westphalia, without prejudice to the Rights, Doctrine, or Discipline of the *Greek, Coptic or Armenian Churches*.

II. That a general Tariff be agreed upon for all *Christian Powers*, without distinction, or special Privileges, in favour of any particular nation.

III. That no Prince or State whatever, shall pretend to the Sovereignty of the *Archipelago*, which will it is hoped, bend very much towards promoting Trade and preventing Disputes for the Flag.

IV. The *Dardanells* to be demolished.

V. The *Dominum Maris* of the Emperors of *Constantinople* to be limited to the Streights of *Gallipoli*.

It may perhaps afford Matter of Speculation, that we should take such Pains to set Boundaries to the Power of the *Constantinopolitan Emperors* in *Europe*, as well by Land as at Sea; but whoever reflects upon the great extent of the *Turkish Dominions* in *Asia* and *Africa*, which by this Partition, are to fall to the Lot of the Emperors of Constantinople, except *Smyrna* and *Aleppo*, with two Islands, it must be concluded, that the *European Powers* cannot be too watchful for their own Security.

The World has to much Reason to lament the exorbitant Power of some Princes, since it has been often employ'd to no other end, but to Support ambitions and unwarrantable Designs.

It is therefore prudent to contrive all expedients for preventing such an Excess of Power in any Prince, as may render him a Terror to his Neighbours.

It is hoped, indeed, that our Scheme of a perpetual Dyet, for establishing the Tranquility of *Christendom*, will produce the end proposed, but it is difficult to guaranty future events; there is a strange Revolution in the course of sublunary Affairs; nothing is more variable than Political Systems; Princes that have been for several years at Variance, are in a Moment, thro' some new Influence or Speculations, running into one another's Arms, and making compliments of what had before cost Streams of Blood.

It is not, then, impossible but the new Emperor, or his Successors,

may in Time, have views that will not quadrate with the Interest of *Europe*, his Power cannot, therefore, be too much confined on that Side; nor would it indeed be prudent to annex *Romania* to the new Empire, were it not for the conveniency of Provisions, and to prevent the Disputes, or Quarrels, which might arise between the Inhabitants of *Constantinople* (who were always a seditious People) and the subjects of the *Roman Emperor*; besides, it must be observ'd, that certain Districts, or Territories are always annexed to great Cities.

All things being now settled in the Congress, for carrying on the War, the Transition to the Field will be natural.

Scheme of the Military Operations

It will be of great importance to have all the Armies in Motion at the same time, in order to strike the greater Terror amongst the Infidels: But to proceed:

The *Russian Army* is to march against the *Tartars* of *Crim* and *Little Tartary*; and after subduing them, then to attack the places upon the Caspean Sea, which, Asoph excepted, are very inconsiderable: As for the *Tartars*, their Discipline is much upon a Level with that of the Militia of *Spain* and other Countries; their great skill in the Art of War, extends no further, than to plunder and burn, which is the Province assigned to them by the *Turks* (to whom they are Tributaries) when they are at war with *Russia* or *Poland*; so that her Czarish Majesty's Troops would have no other Difficulty, but that of securing their Convoys from Nations that subsist by Rapine and Depredations.

The *Polish*, *Danish* and *Swedish* Armies are to rendezvous upon the *Vistula*, and to open the Campain with the Siege of *Choczin*, the Turkish Frontier on the Side of *Podolia*: The Place is well fortified, and will perhaps make a good Defence; but as the Infidels will probably be attack'd at the same time, on the Side of the *Caspian*, in *Greece* and on the *Danube*, they will not be in a Condition to bring any Army into the Field, formidable enough to relieve it, so that it may be supposed, the Besiegers will be Masters of it in thirty Days, open Trenches. The Army is afterwards to March by the *Niester*, to reduce *Moldavia*, *Budziac*, *Tartary*, *Trebizonde* and other Places on the North-West Side of the

Black Sea; and to be commanded by the *Polish*, *Danish* and *Swedish* Generals, alternately.

The *German* Army is to rendezvous at *Belgrade*, and to march to the Siege of *Nizza*; after the Surrender of which, *Viddin* and *Nicoppolis*, and some other places, less important, upon the *Danube*, must be taken, which will prevent the Infidels from sending Provisions, by that River, to the *Black Sea*, for supplying *Constantinople*.

There are some other Places of Strength in the *Turkish* Provinces on that Side; but they are very inconsiderable, when they are viewed in the same Light, with those in *Flanders* and *Germany*, and may be all reduced, in one Campaign, by an Army that commands the Field.

The Army of *France* and the other Powers that are to act on the side of *Greece*, are to rendezvous in *Sicily*, being a country of great Plenty, and lying near the *Archipelago*. This army is to be commanded by his *Sardinian* Majesty, or, if that should be found impracticable, then by a Marshal of *France*.

Both Fleets are to rendezvous at *Messina*, where there is a large and spacious Harbour; a great Number of Transport Ships must be provided, which can be easily effected considering the Nearness of *Leghorn*, *Genoa*, *Naples*, and other Ports in the *Mediterranean*; Part of the Forces may be put on board the Ships of War and Galleys, so that it may be computed, the whole Transport will be performed in three Embarkations, by Reason of the Shortness of the Passage from *Sicily* to the *Morea*, where the first Attempt is to be made, by attacking *Coran* and *Modon*, which lye in the Entrance of the *Archipelago*.

The Islands of *Mytilene* and *Tenedos* must be taken likewise, as well on account of their safe and convenient Harbours, as their Nearness to the *Dardanells*.

The *Dardanells* are too strong Forts in the Streights of *Gallipoli*, about two hundred miles from *Constantinople*, one of which is in *Europe*, and the other in *Asia*, within *Cannon Shot* of each other: Those Forts are look'd upon to be a great Security to Constantinople, but they are much inferior in Strength to those in the *Sound*.

As the Attempt must be on that city, and consequently, the principal Scene of Action on that Side, we must be very particular in every Thing that relates to it.

There are several good Ports near those Castles, capable of receiving numerous Fleets; the Country on each Side abounds with every Thing necessary for supporting Armies; as Wheat, Wines, and Cattle, and it is from thence, that Constantinople is chiefly supplied with Provisions.

But this is not all the Advantage, that will result from seizing those Forts; it will not only cut off all Communications between the *Morea* and *Constantinople*, but likewise with Egypt, which supplies that City with several Kinds of Necessities, so that there is Reason to think, it would soon be compelled to surrender, for Want of Provisions, which must be abundant indeed, to support a Place, where there is above a million of People.

Before I proceed further, it will be incumbent upon me, to obviate an Objection of no small Importance that will naturally arise against this Scheme, that is, that the Power of the Infidels is very formidable, as well by Land as by Sea, and consequently, that they will oppose the Progress of the *Christian Arms*.

I have already, in several Parts of this Essay, delivered my Sentiments of the *Turkish Armies*, which are, indeed, very numerous; but this I lay down as a *Postulation*, that they will never be in a Condition to oppose the *Christian Forces* stipulated by this Scheme, tho' they had not been plunged in the present destructive War with the *Persians*.

As to their Naval Force, we grant, they have a great Number of *Sultanases*, but their principal strength is in their Galleys and Galleasses; it is, however, so inconsiderable when opposed to that of the *Christians*, that we may affirm, they will not venture to appear at Sea against them.

Their Naval Power never made any tolerable figure in the World, since the Battle of *Lepanto*, where they receiv'd a fatal Blow from the *Venetian Fleet*, under the Command of Don John of Austria; nor is it well possible, that any nation can be considerable at Sea, without an extensive Navigation, which alone is the Nursery of Sea-Men, all other Expedients being vain and trifling. Now the Traffick of the *Mohometans* is generally confin'd to their own Dominions being under a Prohibition of Trading with *Christians*; so that they have no skillful sailors, and consequently, we may conclude, they are too prudent to hazard a battle with a *Christian fleet* as is now proposed, since under Providence

there can be no room to doubt, but Victory will fall in the share of the latter.

Let us now return to the operations of the *Christian Fleets and Army*, before the Dardanells, which being attack'd by Sea and Land, must fall into their Hands, after that, they are to proceed to the Bay of *Gallipoli*, where the Troops are to be disembark'd.

The Infidels have large Magazines, and a pretty strong Fort at that place, which must be taken in; then the Army is to march to *Galata*, which is well fortified; this Place is less than a *French League* to the Northward of *Constantinople*, to which it serves for a Suburb; but it cannot make any long Defence against such Forces; and its Surrender will, no Doubt, be soon follow'd with that of the Seat of the Empire, which is not indeed tenable: As for the *Seraglio*, and some other Towers, they may be looked upon in the same Light with the Castles of the City of *Naples*, and those of several other large cities, which are designed for no other End, than to keep the Inhabitants in Awe

Some perhaps will object, that there are several Fortresses in *Greece*, and in the Islands that ought to be taken in according to the Rules of War, which require that *no Enemy should be left in the Rear*; this, we must allow, to be the general Practice; but it is often dispensed with, upon extraordinary Emergencies, as it well may be on this Occasion; for should the *Christians* possess *Constantinople*, the Places in *Greece* must fall of course, all their Communication being cut off with the other *Turkish Dominions*; besides, it must be observ'd, that the Loss of the Seat of the Empire, where the *Sultan* has his *Magazines*, Arsenals, Docks, and all his immense Treasures of Money and Precious Stones, etc., would spread such a consternation thro' the whole Empire, that the Governors of those places would chearfully accept of any Terms; for, generally speaking, the *Fate of a Country depends upon that of the Metropolis*.

Let us now suppose the *Christian Powers* in Possession of all the *Turkish Dominions in Europe*: Our next Progress must be to the Conquest of those in *Asia and Africa*.

This will appear to be a much more practicable Task, than the former; since we may well imagine, the Infidels to have made their greatest efforts in Defence of their *European Territories*:

It must be likewise observ'd, there is not one Garrison in all their *Asiatick* Dominions, or those of *Africa*, that is fortified in the modern Taste; so that we may say, the *Christian* Armies would have little more work upon their Hands, than to take Possession of them.

I am indepted for this Intelligence to *M. Bernier*, a great favourite with the Duke of *Vendosme*, and a skillful Ingineer; he gave many Instances of his great Abilities in that Art, during the War that broke out in *Italy* in the Year 1701; it was then I contracted a strict Frindship with him, on account of his Merit and his Address in conducting Affairs that required Secrecy and Management.

I sent this Gentleman, in the Year 1730, to reconnoitre all the considerable Cities and Fortresses of the *Turks* in *Asia* and *Africa*, where he passed for a *Mussulman*, and where he continued three Years; and he assures me, that even their Frontier Towns there, have no other Fortifications but plain walls and Ditches in the Manner of the Antients.

Before the new Expedition is undertaken, it will in all probability be found necessary, to form new Plans of operation, in which it will be impossible to prescribe any other Rules, than this, that all Efforts should be made to comment more and more the Union of *Christian* Powers, which is the only Basis of all future Hopes and Expectations, and the only *Arcanum* that can pave the Way to the Conquest of the Turkish Empire in *Asia* and *Africa*, which may be accomplished in two Campaigns.

But nothing can be more conducive towards attaining the desirable end, than that the revenues of the new Conquest should be appropriated towards pursuing the grand Design; for we may well imagine, that the Misapplication would create Jealousies, that must be attended with fatal Consequences.

It is likewise absolutely necessary, that no alterations should be made in the Taxes, or the Mode of collecting, for that has often given the greatest Offense to the *Christian* subjects of *Turkey*, when the Fortune of War throw them under the Dominion of *Christian* Powers, and made them wish for the restoration of their old Governors, with whom it is a Maxim, never to make any alterations in their Taxes.

Let us suppose that three Campaigns will reduce the whole *Turkish* Dominions in *Europe*, *Asia* and *Africa* under the Power of the *Christian*

Confederates; our next Effort must tend towards a scheme for preserving them, which can never be effected without a *Perpetual Dyet* of the *Christian Powers*, vested with Authority to determine all Disputes and Controversies amicably.

Had such a Tribunal, as this, been established in *Christendom*, we should not have seen *Europe* so often harrassed and distracted, by unreasonable as well as unnatural Wars.

PART IV

SCHEME OF A PERPETUAL DYET

I. There shall be for the future, a *Perpetual Dyet*, of the Ministers, or Deputies of all the Sovereign Princes and States of Christendom, established at *Ratisbon*, to be under the same Regulations, and to have the same Forms and Manner of Proceeding as are now in use in the *German Dyet* held there.

II. All Controverses that may arise amongst *Christian Princes*, or States, on account of Religion, Successions, Marriages, or any other Cause or Pretence whatever, are to be there determined by such a Number of Voices as are required to make a Majority by the Constitution of the Empire: Such Determination to be made within the Space of one Year, to be computed from the Time any Controversy shall be brought before the Dyet.

III. In case any of the Powers at Variance shall refuse to submit to such Determination, within six months after the same shall be notified Authentically and in Form, then such Power to be treated as a Disturber of the Publick Tranquility, and the Dyet is to proceed against such with Military Execution, until he or they shall submit to their Decisions and make Reparations for All Wrongs, and reimburse all the Expenses of the War enter'd into for that Purpose. The Quota of the Forces of every Prince or State, to be fix'd upon the Foot of the Matriculation now established in the empire.

Thus I have given the Out-Line of the most comprehensive Designs, that have ever yet appear'd in the World; one for subduing the haughty and vast Empire of the *Turks*; another for a partition of the Conquests and the third for securing them, by this Scheme, of a Perpetual Dyet.

What Success my Endeavours will have, must be the product of Time; but the Judicious will soon discern the Labyrinths I must have passed thro', to bring such Projects to any shape or Consistency.

Before I conclude it will be very proper to give some Character of the *Turks*.

Of all Nations upon Earth, they are the most finished Bigots, and slaves to Superstition, as well in Peace, as in War, a Notion prevailing amongst them that they only are *true Believers*, or as it were, the *Elect*; it is upon that fallacious Principle, that they assure themselves of success in all their Enterprizes; but if they happen to be disappointed in the Event, they conclude their Prophet is angry with them for some Transgressions of his Law; which always discourages them from making any new Attempts, or even any tolerable Resistance against *Christian Armies*.

This ill grounded Doctrine has, however, been often advantageous to the *Christians*, in their Quarrels with the Infidels, and particularly in the last *Hungarian War*; for after they were defeated before *Belgrade*, the Place surrendered immediately, tho' it was provided with a Garrison of twenty Thousand Men, as was observ'd before, with a Year's Provision, and that it is one of the strongest Fortresses in the World.

It is thro' the Prevalency of this Opinion, that no People are so slow in Recovering their Losses, or Disgraces; for they think it is in vain to make any vigorous Efforts, 'till they have some visible Marks of being restor'd to the good Grace of their False Prophet.

It is very certain their Naval Power has not yet recover'd the Blow which they receiv'd at *Lepanto*, near two hundred Years ago, nor their Land-Forces that at *Vienna* in 1683.

Their Empire has, indeed, been in a languishing State for more than a Century, which has been, with great Justice, imputed to a general Corruption and Venality, scarcely known in the World, since the Time of the *Romans*; for every Thing is sold amongst these true Believers.

And as no Nation is so slow in recovering their Misfortunes, so none supports them with less Fortitude, pouring all their Wrath upon the Heads of their unhappy Commanders, whenever Victory turns against them.

There is, indeed, an important Objection that lies in our Way, and must be removed before we conclude, that is, that in Case the *Christians* should make war upon the *Turks*, the *Persians* and *Moors* (Subjects

of *Morocco*) would run to their Assistance, all professing the Doctrine of *Mohamet*.

Let us suppose for the present, this to be true, it would, in my Judgment, produce no other Alteration in Our Scheme, than to augment the *Christian Forces*, which can be effected with the greatest Facility, considering the formidable Armies now on Foot in *Christendom*.

Should that be the Case, *Persia* must be attack'd by the Troops of her *Czarian Majesty*, and those of *Poland*, *Denmark* and *Sweden* on the side of *Georgia*, *Gilan* and the Provinces on the South of the *Caspian Sea*.

And as to the *Moors*, it will be easy to give them a Diversion on the Side of the *Atlantick*, and in *Barbary*; and nothing can furnish us with a more despicable Idea of the Discipline of those People, than the many fruitless Attempts upon so unconsiderable a Place as *Ceuta*, for so many Years: Besides, it must be observ'd that their Hatred to the *Turks* is implacable.

But there are the most convincing Reasons to believe, that neither the *Moors* nor *Persians* would take any Part in the Turkish Quarrels, as well on account of Religious Differences, as Interest; nor have I been able to collect from any History, that the *Persians* ever sent Succours to the *Turks*, in any of their Wars with the *Christians*; there are no Nations in the World so piqu'd at each other, tho' both derived from the same stock, and the Hatred of the *Persians* to their Brethren is so boundless, that it is a saying amongst them; *There is more Merit in killing one Turk than nineteen Christians*.

To this we must add, that the Conquest of *Turkey in Europe* might be well effected, before either the *Persians* or *Moors* could send any Succours, considering the present shatter'd and ruinous Condition of their Armies and Affairs.

But as all those Mohamelan nations, Turks, Persians and Moors, have for several years been harrass'd and wasted by intestine Wars and Rebellions, it would seem, as if the Divine Hand was directing the Christian Sword to put a Period to the Dominions of the Infidels, and to accomplish a Prophecy which is in several Copies of their Alcoran, That in the later times, the Sword of the Christians will rise and drive them from their Empire. FINIS.

THE INTERNATIONAL OPIUM CONFERENCE

PART II*

There is nothing that would please the writer more than to describe the international atmosphere in which the Opium Conference convened and proceeded to its deliberations and conclusions. That, however, must reside in memory for the present.

The date for the assembling of the conference was originally fixed by the Netherlands Government for May 31, 1911; but because several of the Powers were not able to make the necessary study of the morphine and cocaine questions by that time, as requested by Great Britain, the date for the meeting of the conference was postponed to December 1, 1911.

The delegation of the United States to the conference was composed of the following members:

Delegates Plenipotentiary: Charles H. Brent, of the Philippine Islands; Hamilton Wright, of Maine; Henry J. Finger, of California.

Secretary to the Delegation: Frederick L. Huidekoper, of Washington, D. C.

Assistant Secretary and Disbursing Officer: Wallace J. Young, of Illinois.

The spirit which animated the American delegation, and the reservations and additional proposals made in regard to the tentative program proposed by the American Government for the conference,¹ will be more readily comprehended by a study of the following instructions issued by the Department of State:

DEPARTMENT OF STATE,
Washington, October 18, 1911.

Messrs. CHARLES H. BRENT, HAMILTON WRIGHT, and H. J. FINGER,
Delegates of the United States to the International Opium Conference.

GENTLEMEN: You are informed that you have been appointed delegates plenipotentiary to represent the United States at the International

* First part printed in the October, 1912, number of the JOURNAL.

¹ *Vide*, Part I, October, 1912, JOURNAL, pp. 868-869.

Opium Conference which is to meet at The Hague on the 1st of December, 1911.

The need of such a conference was suggested by the American delegation to the International Opium Commission at one of the final sittings of that body which met at Shanghai in February, 1909; and although no formal action was taken, the Department of State, having considered the unanimous conclusions arrived at by the commission as a whole, and the report of the American delegates thereto, deemed it advisable to issue a proposal to the interested Governments that a conference should meet at The Hague, or elsewhere, composed of one or more delegates of each of the participating states, and that such delegates should have full powers to give to the main salutary propositions of the commission and the essential corollaries derived therefrom the force of law and international agreement. Therefore, on the 1st day of September, 1909, this Government issued a circular proposal to the Governments concerned, in which it was stated that the United States had learned with satisfaction of the results achieved by the International Opium Commission; that in the opinion of the leaders of the antiopium movement much had been accomplished; and that both the Government and people of the United States recognized that this was largely due to the generous spirit in which the representatives of the Governments concerned approached the subjects submitted to them. It was pointed out that the Government of the United States appreciated the magnitude of the opium problem and the serious economic interests involved in the production of and trade in the drug; and that a deep impression had been made by the friendly co-operation of the powers financially interested, and by the desire, as expressed by the resolutions of the commission, that the opium evil should be eradicated not only from far eastern countries, but also from the home territories and possessions in other parts of the world of the powers therein represented. It was stated that, as the result of the investigation of the opium problem in the United States, it had become apparent, quite apart from the question as it affected the Philippine Islands, that a serious opium evil obtained in the United States itself; that this was primarily due to the large Chinese population in the country, to the intimate commercial intercourse with the Orient, and to the unrestricted importation of opium and manufacture of morphia.

Thus it was observed that the interest of the United States in the opium problem is material as well as humanitarian, and that, as the result of the investigations made before the meeting of the International Opium Commission, the Congress enacted legislation which aimed to prevent the importation of opium into the United States except for medicinal purposes. But it was noted that the United States is not an opium-producing country, and that in order to make its present and proposed laws fully effective and so stamp out the national opium and allied evils, there should be control of opium and other habit-forming

drugs shipped to this country; and therefore that, to attain this end, it would be necessary to secure international coöperation and the sympathy of opium-producing countries.

Continuing, the proposal stated that this Government, impressed by the gravity of the opium and allied problems and the desirability of divesting them of local and unwise agitation, as well as by the necessity of maintaining the entire question upon the basis of fact, as determined by the Shanghai commission, suggested the following tentative program:

(There then follows the items from (a) to (n) of the circular proposal of Sept. 1, 1909.)

It was made plain, however, that the United States had no desire to prescribe the scope of the conference or to present a program which might neither be varied nor enlarged; but that the tentative program was submitted in the belief that it would serve as a basis at least for preliminary discussion. A formal expression of opinion was invited on the topics outlined, and an enumeration requested of the other aspects of the opium problem which might seem of peculiar importance to any participating nation.

This circular proposal was made to those Governments which were represented in the International Opium Commission and to the Turkish Government, which, although invited to participate in the International Opium Commission, failed to do so because it had no diplomatic representative in the Far East.

The proposal for an international opium conference has been accepted by all the Governments to which it was made, except those of Austria-Hungary and the Ottoman Empire.

The Government of the Netherlands very courteously suggested that the conference meet at The Hague. This has proved to be agreeable to all of the powers; and the question of the date of the conference having been left to the Netherlands Government, that Government has finally found that December 1 next is acceptable, and invitations naming that date have been accordingly issued to the assenting Governments.

With regard to the tentative program laid down in this Government's circular proposal, the following reservations, additional proposals, and suggestions have been made by certain of the participating powers:

The French Government, making no objection to items (b), (c), (d), (e), (f), (j), and (k), has remarked as to items (a), (g), (i), (l), (m), and (n) of the tentative program that item (a) demands the adoption of uniform national laws and regulations to control the production, manufacture, and distribution of opium, its derivatives and preparations, and expresses the view that they do not believe that it is desirable that this question should be brought up. In regard to this item it has been explained to the French and British Governments that a mistake was made by this Government in using the words "uniform national laws;" that they should have been "effective national laws;" that item (g)

proposes the application of the pharmacy laws of the Governments concerned to their subjects in the consular districts, concessions, and settlements in China, and expresses the view that at present it would seem to be impossible to accomplish this purpose, as it would tend to place in the hands of the Chinese or nationals of countries not signatories to a convention the exercise of the profession of pharmacy in the concessions; that item (*i*) as to the establishment of uniform provisions of penal laws concerning offenses against any agreement that the powers may make in regard to opium production would mean a modification of French penal laws, and that this is such a grave question that the Government of the Republic is not prepared to bring it up in the French Parliament. As to items (*l*) and (*n*), which raise the question of the right of search, and about which public opinion in France has always shown itself particularly susceptible, the French Government would not renounce its principles in this matter to prevent contraband opium. The French Government also reserves its opinion in regard to item (*n*), which involves the question of an international commission to supervise any international agreement concluded by the conference. Within the limits thus indicated the French Government has declared its readiness to study proper measures to bring about the gradual suppression of the unnecessary production and misuse of opium.

The German Government, agreeing to the general principles of the tentative program, in particular consented that the morphine and cocaine questions be made the subject matter of deliberations at the conference.

The British Government, after pointing out that the illicit traffic in morphine and cocaine in India, China, and other far eastern countries is becoming more grievous and deadly than opium smoking, and that such an evil is certain to increase as the restrictions which are now being placed in India and China on the production and use of opium become more stringent, suggested that the powers participating in the conference should definitely consider beforehand the question whether they would be prepared to make a statistical study of the manufacture and trade in morphine and cocaine and agree to impose severe restrictions on such manufacture of and trade in the drugs in their respective territories. Further, the British Government has stated that they take exception to those items of the tentative program numbered (*h*), (*l*), (*m*), and (*n*), and that they will not be prepared to discuss in the conference: First. The arrangement made between His Majesty's Government and China respecting the progressive restriction of opium imports and of opium production in China (i. e., the so-called 10-year agreement). Second. Other existing treaties between the two countries. It may be stated that all of the participating Governments have accepted the proposals of the British Government in regard to morphine and cocaine.

The Chinese Government has suggested in regard to item (*a*) of the tentative program that, in drawing up laws and regulations, there should

be no interference with the sovereign rights of any nation; that in regard to item (*i*) that offenses against any agreement that the powers might make should be punished by each country according to its own penal laws; that in regard to item (*l*) that the right of search of vessels should be restricted by the Governments concerned to vessels found within their own territorial waters; and in regard to item (*n*) that there would be no need of an international commission to supervise any agreement reached by the conference and assented to by the interested Governments.

The Italian Government has pointed out the importance of the question of the traffic in Indian hemp drugs to that Government and has suggested that the conference might advantageously deal with the question of this traffic.

The Netherlands Government, while agreeing to the general principles of the tentative program, at the same time observed that for the Netherlands Indies, where the culture of the poppy does not exist and where the opium régime has been or will be introduced, the question of most importance to the Netherlands Government is for the conference to arrive at an agreement as to measures to be taken to combat the smuggling of opium.

The Russian Government, while approving in principle of the general tenor of the tentative program, took exception to item (*f*) inasmuch as there is almost no production of opium in Russia, and for that reason the restriction and control of the cultivation of the poppy, as provided for by that item, would be superfluous as far as Russia is concerned, and would oppose a serious obstacle to the development of a possible branch of Russian agriculture.

The other powers have accepted the tentative program as a basis for discussion, reserving their particular views upon it, which will be expressed at the conference itself.

You will see, therefore, that, although the tentative program proposed by the United States has been in some respects narrowed by the reservations made by several of the powers, generally speaking, the scope of the work of the conference has been broadened by the suggestions that it include in its deliberations the question of the manufacture of and trade in morphine and cocaine and the Indian hemp drugs. It therefore seems to this Government desirable that the production of and traffic in all habit-forming drugs which have been proved to be a menace to the moral, physical, and economic welfare of the world would be considered by the conference and adequately dealt with by it in the spirit of resolution 5 of the International Opium Commission, which places a ban on all drugs which appear on scientific inquiry to be liable to abuse and productive of the ill effects of opium, its derivatives, or preparations.

It would be inexpedient to limit you by too rigid instructions upon the different questions which may be brought forward in the conference for discussion; but you should closely bear in mind that, though it has

been clearly demonstrated that the United States has large material interests in any action which the conference may take, this Government has no revenue of moment at stake; and that primarily the international movement for the suppression of the opium evil was initiated by this Government with the object of assisting China in her recent and energetic effort to suppress her opium evil.

* * * * *

All of your communications and reports to this Government will be made to the Department of State for due consideration and final preservation in the archives. The records of the delegation will be kept by its secretary, Mr. Frederic L. Huidekoper. Should you be in doubt at any time in regard to the meaning or effect of these instructions, or should you consider at any time that there is occasion for special instructions, you will communicate concisely with the Department of State by telegraph.

I may say to you that it is the President's earnest desire that the very old and troublesome opium problem growing out of the abuse of opium and the allied habit-forming drugs may be successfully dealt with by the conference.

I am, gentlemen, your obedient servant,

ALVEY A. ADEE.

The Dutch Government set aside for the use of the conference a part of the Hall of the Knights, the seat of the States General, and on the first day of December, 1911, at 3 o'clock in the afternoon, the conference was opened by his excellency the Minister for Foreign Affairs of the Netherlands in the presence of the delegations representing the twelve nations, the diplomatic corps, the press, and the general public. His excellency the foreign minister made a felicitous address of welcome, saying amongst other things, that the Netherlands Government considered it a special privilege to greet at the royal residence a conference of eminent diplomats and experts arrived from the four quarters of the globe to discuss an international problem; that the problem before the conference pressingly claimed solution for the welfare of mankind; that the conference would have to deal with one of those complications of Providence where God had created a plant containing in itself the elements to make it a real benefactor to humanity, but where man had by an abuse of that benefit transferred it into a scourge spreading economic ruin and moral as well as intellectual degradation; that the Netherlands Government had been anxious for the honor of seeing the conference

meet on Netherlands soil, the mother country of vast colonies where the opium problem was of great actual importance, and that the interested governments having responded to that appeal with an enthusiasm as graceful as it was flattering, he extended the welcome of the royal government to the conference as a tribute of gratitude.

At the conclusion of this address of welcome the first delegate of the Netherlands Government proposed for president of the conference Bishop Charles H. Brent, of the American delegation. This was seconded by the chiefs of the British and German delegations. With the unanimous consent of the assembly, Bishop Brent accepted the presidency and then delivered an address, partly personal, in which, besides thanking the conference for the honor of the presidency, he called attention to the work of the International Opium Commission, which convened in 1909, and then outlined the purpose for which the International Opium Conference had been assembled. On the termination of the presidential address, and with the consent of the conference, the president proposed the personnel of the secretary general's office. His Excellency R. de Marees van Swinderen, Minister for Foreign Affairs of the Dutch Government, was elected honorary president. In the name of the conference the president dispatched the following message to Her Majesty the Queen of the Netherlands:

The representatives of the 12 nations assembled at The Hague for the International Opium Conference have the honor to lay at the feet of Your Royal Majesty the homage of their most respectful devotion and the expression of their gratitude for the gracious reception given to them in your residence.

At the second plenary session of the conference the president read the following telegram:

I am glad to see at The Hague the representatives of twelve states assembled for an International Opium Conference. Thanking you, Mr. President, for the feelings which you have interpreted, I express to you my good wishes for the humanitarian goal of the conference.

WILHELMINA.

Previous to the assembling of the conference, the Netherlands Minister for Foreign Affairs had requested the American delegation to suggest a body of rules to govern the conference. At the second plenary session

the conference proceeded to consider the tentative rules proposed by the American delegation, which were as follows:

Rule I. The International Opium Conference is composed of all the plenipotentiaries and technical delegates of the powers which have accepted the proposal of the United States Government and the invitation of the Government of the Queen of the Netherlands.

Rule II. After organizing its bureau, the conference shall appoint committees to study the questions submitted to it. The plenipotentiaries of the powers are free to register on the lists of these committees according to their own convenience, and to appoint technical delegates to take part therein.

Rule III. The conference shall appoint the chairman of each committee. The committees shall appoint their secretaries and reporters.

Rule IV. Each committee shall have the power to divide itself into subcommittees which shall organize their own bureau.

Rule V. A drafting committee for the purpose of coordinating the acts adopted by the conference and preparing them in their final form shall also be appointed by the conference at the beginning of its labors.

Rule VI. The members of the delegations are all authorized to take part in the deliberations at the plenary sessions of the conference as well as in the committees of which they form part. The members of one and the same delegation may mutually replace one another.

Rule VII. Every resolution or motion proposed for discussion by the conference must, as a general rule, be delivered in writing to the president, and be printed and distributed before being taken up for discussion.

Rule VIII. The public may be admitted to the plenary sessions of the conference when the conference itself so decides. Tickets shall be distributed for this purpose by the secretary general with the authorization of the president.

Rule IX. French shall be the official language of the conference, and the minutes shall be recorded in this language. However, other languages may be used in the conference.

Rule X. Special questions which have been already dealt with in the sessions of the committees can not be discussed in pleno by a member of a delegation in a speech of more than 10 minutes, unless the conference decides otherwise.

The rules as finally adopted by the conference follow:

Rule I. The International Opium Conference is composed of all the delegates of the powers which have accepted the proposal of the United States Government and the invitation of the Government of the Queen of the Netherlands.

Rule II. After organizing its bureau, the conference shall discuss in pleno the best method of drafting a program. The conference may, if

necessary, appoint committees to study the questions submitted to it. The delegates of the powers are free to register on the lists of these committees as may appear convenient to them.

Rule III. Each committee shall appoint a chairman, secretary, and reporter.

Rule IV. A drafting committee for the purpose of co-ordinating the resolutions adopted by the conference and preparing them in their final form shall also be appointed by the conference at the beginning of its labors.

Rule V. All the delegates are authorized to take part in the deliberations at the plenary sessions of the conference as well as in the committees of which they form part. The members of one and the same delegation may mutually replace one another.

Rule VI. Members of the conference attending the meetings of committees of which they are not members, are not to be entitled to take part in the deliberations without special authorization of the chairman of the committees.

Rule VII. When a vote is taken, each delegation shall have only one vote. The vote shall be taken by roll call in the alphabetical order of the powers represented.

Rule VIII. Every resolution or motion proposed for discussion by the conference must, as a general rule, be delivered in writing to the president and be printed and distributed before being taken up for discussion.

Such proposals can not be voted on during the same session without the unanimous consent of all the delegations.

Rule IX. A committee of three delegates shall be appointed by the conference, to which shall be intrusted the duty of making any communications to the press.

Rule X. The minutes of the plenary sessions of the conference and of the committees shall give a succinct résumé of the deliberations. A proof copy of them shall be delivered with as little delay as possible to the members of the conference; they need not be read at the beginning of the sessions, except on the request of a delegate.

Each delegate shall have a right to request the insertion in full of his official declarations according to the text delivered by him to the secretary and to make observations regarding the minutes.

The reports of the committees shall be printed and distributed before they are taken up for discussion.

Rule XI. French shall be the official language of the conference, and the minutes shall be recorded in this language.

However, other languages may be used in the conference. This rule shall not exclude the delivery of a translation to those delegates who desire to receive these documents in any other language.

Rule XII. Special questions which have been already dealt with in the sessions of the committees can not be discussed in pleno by a mem-

ber of a delegation in a speech of more than 10 minutes, unless the conference decides otherwise.

Some discussion having arisen as to the program of the conference, the following statement was made on behalf of the American delegation:

That the United States had endeavored to secure from the interested governments a definitive program for the conference, based on the tentative program contained in its circular proposal of September 1, 1909, and the additional proposals of Great Britain, but had failed to do so because several of the governments had expressed a desire to reserve their views until the conference had assembled; that it was now apparent that a committee to be termed the program committee should be selected, and that this committee, composed of members from each delegation, should formulate a definitive program for the conference.

This view was concurred in by all of the delegates, and the following resolution, proposed by the American delegation, was unanimously adopted:

That a committee to be called the program committee be appointed, consisting of one representative from each delegation, and that it be authorized to prepare and submit to the conference a draft program for consideration, such program to be based upon the suggestions made on behalf of the United States of America as modified by the several powers which have made reservations thereon and upon the additional suggestions made on behalf of Great Britain and Italy; and that any further matters which the conference may subsequently decide to take into consideration shall similarly be first referred to the same committee.

Under this resolution a partial program was designed for the conference. Some delay and confusion which afterwards occurred would have been avoided if the conference had sent all new proposals to this committee to be properly formulated, instead of discussing them in plenary session, as was insisted upon by several of the delegations present.

Rule 8, as adopted by the conference, proved to be a cause for delay, and it was finally changed, on suggestion of the Japanese delegation, to read as follows:

Every resolution or motion proposed for discussion by the conference must, as a general rule, be delivered in writing to the president, and be printed and distributed before being taken up for discussion.

The resolution referred to in the present rule is one of such character as is destined to form the subject of international agreement and consequently to require a careful study beforehand; and does not include a resolution offered in the course of the sitting of the conference for transaction of business.

Such proposals can not be voted on during the same session, without the unanimous consent of all the delegations.

Under the rules, the deliberations of the conference were to be kept secret, or at least not communicated by members of the conference to the press except through the agency of the press committee of the conference. It may be observed that this rule was not fully respected, and at one of the plenary sessions the president called the attention of the conference to the fact. Some adverse comment has been made because the conference chose to deliberate *in camera*. It should be stated in this connection that the American delegation was one of those opposed to a day to day publication of the proceedings of the conference, for it recognized that the conference was dealing with the production and traffic in commodities the present and future value of which would be largely determined by the definitive conclusions of the conference. It was, therefore, the desire of the American as well as the other delegations that nothing should go forth during the sitting of the conference that would lead to a speculative activity in the production of and trade in opium, morphine, and cocaine. This proved to be a wise view, for the convention as signed at The Hague had no sooner been published than there was a large increase in the market price of the drugs, part of which was undoubtedly speculative.

A feature which did not lend itself to the expedition of the work of the conference was the adoption of French as the official language, as provided by Rule XI. At the International Opium Commission English was the official language because the most convenient to the majority of the commissions. A large majority of the delegates to the conference preferred to speak English in spite of Rule XI, and the French delegation expressed itself bilingually. The proceedings were taken down in English, then translated into French, and printed in English as well as French, for the convenience of those delegates who were not thoroughly acquainted with the latter language. This procedure often led to delay, and it was not until the last two or three sessions that the conference

could approve of its transactions to that time. This incident alone illustrates the necessity of a conference proceeding by a language most convenient to the majority of the delegates, when it has to deal with questions like the opium and allied questions involving vast economic interests.

Rule IV provided for a *comité de redaction*, or editing committee — the original intention being that this committee should have referred to it the final action of the conference for edition. In practice, however, this committee took up the day-by-day work of the conference, and attempted to reduce it before the ultimate views of the conferees had been expressed. Before the conference had been long in session disputed questions were also referred to this committee rather than to the program committee, or to a conciliating committee, which, mooted by the American delegation, did not prove to be acceptable to the conference. Some confusion ensued, and it finally became necessary for the conference to add to the editing committee M. Asser, the eminent international jurisconsult. M. Asser's services proved to be pre-eminently valuable, and before adjournment the conference unanimously expressed its debt of gratitude to him.

The American delegation fruitlessly strove to have the actual work of the conference done in commission and committee—a practice that had been followed with great success by the first and second International Peace Conferences, and by the more recent London Naval Conference. But a majority of the members of the conference insisted on threshing out intricate and difficult economic and diplomatic questions in the plenary sessions. It is to be hoped that at future Hague conferences the plan of working details be by commissions and committees which shall report to the conference in plenary session for approval, and after such approval submit the reports to a small editing committee for final revision.

It should be noted that, at an early stage of the proceedings of the conference, an attempt was made by several delegations to prevent the introduction of new matter and ideas during the remaining sessions of the conference. This view was strenuously opposed by the American delegation as being inconsistent with free discussion such as had always obtained in conferences composed of representatives of sovereign

Powers. To secure the acceptance of this principle, it became necessary during the tenth plenary session for the American delegation to maintain its position by quoting the precedent established at the last Hague Peace Conference, at the instance of the delegates of Great Britain. The position of the British Government at that conference was expressed as follows:

The delegates of Great Britain consider that the adoption of the program of the work to be studied in the committees and commissions of the conference does not exclude the possibility of putting into the daily work or order of the day other subjects which might be submitted during the duration of the conference.²

After some discussion, the above mentioned precedent was unanimously accepted, and no further attempt was made to hinder free discussion in the conference.

In spite of the difficulties attending a defective organization, it is to the great credit of all the representatives that they were animated by a lofty spirit and a determination that the conference should achieve the practical results which had been hoped of it. This hope was fruitful, although the convention, as signed, presents unique features as to ratification and effectuation.

The positive results of the conference may be stated as follows: Immediately after the adjournment of the International Opium Commission there were drafted in the Department of State two measures designed to control the foreign and interstate traffic in the United States of opium, morphine, and cocaine. When the conference assembled, it was soon seen that the principles contained in those measures were principles that could be readily applied by an international conference to the international traffic in the commodities under consideration. It may be said, therefore, that the International Opium Convention, as finally agreed upon, is based in part on well recognized principles, or proposed principles, of American interstate and navigation law. That part of the convention having to do with central governmental control of the drugs is based on the best European and Japanese

² *Vide*, Proceedings of Second Peace Conference, Vol. I, pp. 58-59.

practice, which on the whole is far in advance of the practice of our Federal Government.³

A review of the convention will make this occult. Chapter I defines raw opium, and contains pledges on the part of the Powers for the governance of the domestic and international traffic therein; Chapter II, of similar import, applies to opium prepared for smoking; and Chapter III to medicinal opium, morphine, and cocaine. Chapter IV, of five articles, is composed of pledges on the part of the treaty Powers represented at the conference aimed to assist China in suppressing her great and vexatious opium problem. Chapter V is composed of Article 20 as to possible laws, and Article 21 as to illegal possession of opium and as to the international exchange of documents and statistics. Chapter VI, of four articles, is composed of final provisions on supplementary signature, ratification, effectuation, and arbitration of the convention such as have never before been seen in an international document.

The first paragraph of Chapter I gives a practical commercial definition of raw opium, and fairly well conforms to the definitions of this substance as provided for many years in tariff legislation of the United States.

By Article 1 of the convention the contracting Powers pledge themselves to enact effective laws or regulations to control the production and distribution of raw opium, unless their existing laws and regulations have already regulated the matter. That is, by this article the interested governments must effectually bring under some sort of government supervision, either by the monopoly system as practiced in Japan, or by authorization of persons, the production and distribution of raw opium.

By Article 2 of the convention the contracting Powers pledge themselves to restrict the number of cities, ports, and other places through which raw opium may be exported or imported. This article is in accord with American practice, for by virtue of the regulations issued by the Secretary of the Treasury under authority of the opium exclusion act approved February 9, 1909, the importation of opium into the United States is confined to 12 named ports. In practice, the effect of this

³ For text of the Convention and the Final Protocol of the Conference, *vide SUPPLEMENT* for July, 1912, pp. 177, 189.

article will be to secure a more strict governmental control of the importation and exportation of raw opium for medicinal purposes.

Article 3 is one of the most important articles of the convention in that it marks the formal adoption of a new principle of international commercial law, which, although in this case applies to opium, was recognized by all the delegates as applicable by future conferences to all commodities in international transit. By Article 3 the contracting Powers pledge themselves to take measures (*a*) to prevent the exportation of raw opium to countries which have or may prohibit its entry, and (*b*) to control the exportation of raw opium to countries which regulate or may regulate its importation. This article conventionalizes resolution 4 of the International Opium Commission, which was pressed by the American delegation and finally adopted by that commission. China had for 50 years or more contended against the exportation of Indian opium to China, frankly avowing first by protest and then by legalization of the traffic that she was unable wholly to prevent the inroad of the drug. That contention had been scorned by some of the greatest statesmen and economists of their day, the generally accepted view being that it was the business of a country prohibiting the entry of any drug or commodity to prevent its importation, an exporting country not being greatly concerned with the destination of the exported article.

Upon the ratification by the various governments of the present convention, by virtue of Article 3, it will become an accepted principle of international commercial law that where a country has prohibited the importation of a drug or commodity, it is the business of a producing country to prevent the exportation of such products to the prohibiting country, or to prevent the exportation of such products unless the exporter conforms to the importation regulations of a regulating country. All the delegates recognized that this principle—though by this convention specifically applied to the opium traffic—could nevertheless be made applicable to any obnoxious or dangerous commodity in international trade. The adoption of this principle is of great credit to those opium-producing countries vitally affected by it. As concerns the United States and its possessions, in which no opium of any amount is produced, it is of great practical value, and when it becomes effective, will enable the preventive service of the customs effectually to exclude

opium except for medicinal purposes, as provided for by the opium-exclusion act approved February 9, 1909, proposed legislation to strengthen that act, and Philippines legislation having the same object in view.

By Article 4 of the convention the contracting Powers pledge themselves to enact legislation or issue regulations providing that every package containing raw opium intended for export shall be marked so as to indicate its contents, provided the shipment exceeds 5 kilograms. It was an object of the American delegation to secure that every package of opium for export should bear such marks. But as by Treasury regulation issued under the authority of the opium-exclusion act of February 9, 1909, delivery is made by the customs service of packages of opium containing not less than 100 pounds, it may be said that this article, as adopted by the conference, marks a decided advance on American practice.

By Article 5 the contracting Powers shall permit only duly authorized persons to import and export opium. In practice this will mean that all persons importing and exporting opium must first of all receive governmental authorization.

Chapter II of the convention is of striking importance, as it provides for the obliteration in a short time of the manufacture, exportation, importation, and use of opium for smoking purposes, and, in the meantime, for the confining of such manufacture and use to territories where such manufacture and use now obtain by totally forbidding the export of this form of opium to countries which have prohibited its entry and use or to countries which propose in the future to prohibit its entry and use.

The first paragraph of Chapter II defines the substance known as opium prepared for smoking, and by Article 6 the contracting Powers pledge themselves to take measures for the control, and ultimately effective suppression of the manufacture, domestic traffic in, and use of this form of opium.

When it is recalled that not 10 years ago there was a large and influential body of public officials and others here and abroad who saw no harm, economic, moral, or otherwise, to oriental peoples, in opium smoking, the importance of Article 6 will be recognized. It marks the

right-about of such opinion, and a recognition by the governments and peoples concerned that the opium-smoking vice is generally degrading beyond all benefits to revenue that may accrue from the manufacture, importation, exportation, and use of this form of opium, and a determination on the part of those governments and peoples to bring the vice to a speedy conclusion.

By Article 7 the contracting Powers pledge themselves to prohibit not only the importation of the smokable form of opium, but also its exportation—thus conforming to one of the principles embraced by the American opium exclusion act of February 9, 1909, and the proposed amendment thereto.

By Article 8 of the convention the contracting Powers which are not yet ready to prohibit the exportation of opium prepared for smoking are pledged to restrict the number of places through which such opium may be exported; to prohibit its exportation to countries which now or hereafter may prohibit its importation; in the meantime to forbid the shipment of any prepared opium to a country that wishes to restrict its admission, unless the exporter complies with the regulations of the importing country; to take measures to have each parcel exported bear a special mark indicative of the nature of its contents, and allow none but specially authorized persons to export this pernicious form of the drug.

It might seem from a hasty reading of Article 8 that a general international traffic in prepared opium is sanctioned. But such is not the case, for it should be borne in mind that where it had become necessary every country represented at the conference had prohibited the importation, and in some cases the exportation and use of this form of opium, and the colonies and possessions of all of the countries except Portugal had passed strict laws forbidding the importation and in most cases the exportation of prepared opium. The notable instance of this not having been done is in the Portuguese Colony of Macau on the China coast, where large quantities of this form of opium have been and are still manufactured both for use in the colony and for exportation—the object being colonial revenue. The great mass of this opium is intended for Chinese and other consumers in the United States, the Philippine Islands, Canada, and Mexico. By the opium exclusion act of Feb-

ruary 9, 1909, the importation of this form of the drug into the United States is prohibited. The importation, manufacture, and use of it is prohibited in the Philippines.

A recently enacted Canadian statute not only forbids the importation of this form of the drug, but its manufacture, transshipment, or exportation. The Attorney General has held that under our opium-exclusion act of February 9, 1909, prepared opium may be imported into the United States for immediate transshipment by sea. Mexico has no law on the subject. The result is that the great mass of Macanese opium is brought to San Francisco and immediately transshipped by sea to western Mexican ports, from whence it, added to the direct Mexican import, is mostly smuggled into the United States across the Mexican border. Therefore, Portugal, at her colony of Macau, is the only country to-day which permits the export of this vicious form of opium, while the ports of all those countries parties to the convention are closed to it. The measures necessary to counteract and suppress this traffic to the United States are embodied in a proposed amendment to the opium-exclusion act of February 9, 1909, and will be adverted to later. It may be shown that if the Congress will enact the proposed amendment the international traffic in smoking opium will be practically wiped out.

Chapter III of the convention is an important one and proved to be the most difficult to formulate of all the chapters of the convention except that one containing the final provisions. The traffic in raw opium and opium prepared for smoking had been thoroughly studied by the International Opium Commission at Shanghai and by the various national commissions appointed by the interested governments before that commission met, or which sat in the interval between the adjournment of the International Opium Commission and the assembling of the International Opium Conference. After the British Government made it a *sine qua non* that their participation in the International Opium Conference would depend upon the willingness of the interested governments to pledge themselves to the same drastic legislation for the control of the production, manufacture, and trade in morphine and cocaine as in regard to opium, all the interested governments willingly assented to this proposal when it was presented to them by the United States and the Netherlands Government on behalf of Great Britain.

But a new factor was, nevertheless, injected into the problem and had to be met.

The necessity for the British proposals had become obvious to all the governments interested in the Far East; for, beginning with the suppression of the opium vice in China and other far eastern countries, a determined, and one almost might say a calculated, effort was made by the manufacturers of morphine and cocaine to introduce these drugs in replacement of opium. Such efforts had largely succeeded, and to the world was presented the spectacle of many great governments willingly sacrificing or providing for the sacrifice of an aggregate annual opium revenue in the neighborhood of \$100,000,000, only to see the subjects of some of them pressing two other deadly drugs into the hands of those far eastern people who had heroically determined and were bent upon the abandonment of the opium vice. The British proposals in regard to morphine and cocaine were eminently sound, practical, and essential, and it became the duty of the International Opium Conference to provide against the abuse of morphine and cocaine similarly as regarded opium.

Chapter III of the convention is not by any means ideal, but represents a fair compromise of conflicting interests, and will no doubt be perfected by future conferences on the question. The first paragraph of Chapter III defines medicinal opium as opium that must contain not less than 10 per cent of morphine. This is superior to the tariff practice of the United States, which provides for the admission of medicinal opium containing not less than 9 per cent of morphine, but it confirms the standard for medicinal opium set by the International Pharmaceutical Conference of 1906, to which the United States is a party. Morphine, cocaine, and heroin are also defined by this paragraph.

By Article 9, Chapter III, the contracting Powers pledge themselves to enact laws or regulations so as to restrict the manufacture, sale, and use of morphine and cocaine and their respective salts to medicinal and legitimate uses only, unless their existing laws and regulations already cover the matter. This article appertains to national legislation only, and it will be pointed out later that the United States is the most backward of all the western nations and almost strikingly behind Japan in this phase of legislation.

Article 10, Chapter III, is weak in that the Powers only pledge themselves "to use their best efforts to control or cause to be controlled" those who manufacture, import, sell, distribute, or export morphine, cocaine, and their respective salts and the buildings in which such persons carry on that industry or trade. The article then goes on to lay down the specific manner in which this object shall be accomplished.

There was a willingness on the part of all the delegations to formulate this article as strictly as the articles dealing with raw opium and opium prepared for smoking. But there were certain constitutional difficulties in the way—notably in the case of Germany—and Article 10 was a compromise based on the fact that Germany has extremely strict and effective national and State laws governing the question dealt with by Article 10. This is also true of several of the other European countries represented in the conference, and certainly of Japan.

By Article 11 the contracting Powers are to take measures to prohibit in their home trade any delivery of morphine, cocaine, and their respective salts to any but authorized persons, and by Article 12 the importation of morphine and cocaine is restricted to persons authorized by the government.

What was said of Article 10 may be said of Article 13, where the contracting Powers do not pledge themselves to adopt, but only to use their best efforts to adopt or cause to be adopted measures to prevent the exportation of the named drugs from their home territories, possessions, colonies, and leased territories to the countries, possessions, colonies, and leased territories of the other contracting Powers, and provides that each government may communicate from time to time to the governments of exporting countries the lists of persons to whom authorization or permits to import the named drugs shall have been granted. It was the hope of the American delegation that a distinct pledge be made by the interested governments to enact legislation to prevent the exportation of these drugs except by authorized persons in one country to authorized importers in another. But it was not found possible to secure this.

By Article 14 the contracting Powers pledge themselves to apply their laws and regulations governing the manufacture, importation, sale, and exportation of morphine, cocaine, and their respective salts

to medicinal opium and to all preparations of opium containing not more than 0.2 per cent of morphine or more than 0.1 per cent of cocaine and heroin, and also to any new derivative of morphine and cocaine, or any other alkaloid of opium which might be shown by general scientific research to occasion similar abuses and result in like noxious effects. Article 14 again represents a compromise. The American and several other delegations pressed to have the exceptions in this article as to percentages of morphine, cocaine, and heroin deleted, but failed to accomplish their purpose.

Chapter IV is composed of articles governing the opium traffic as it has obtained in the past between China and the nationals of several governments represented. The interest of the United States in this chapter may be said to be important, because it contains principles for which the Chinese Government and people long contended, principles which were supported by the United States in its first treaty (1844) with China, and by Article II of the treaty of 1880 with China, which directly prohibit American citizens from entering into the Chinese foreign or coastwise traffic in opium. Chapter IV revolves somewhat on the agreements made between China and Great Britain; the so-called 10-year agreement of 1907 and the modification of that agreement, signed at Peking May 8, 1911.

To make this clear the reader should refer to what has already been stated in regard to the so-called 10-year agreement between Great Britain and China of 1907,⁴ and to the modification of that Agreement signed on May 8, 1911.⁵ By so doing it will be seen that the great leaders of the British Government,—more particularly Sir Edward Grey, Lord Morley, Earle Crewe and Lord Minto as Governor-General of India, had determined upon an agreement with China by which the Indo-Chinese opium traffic should be abolished *pari passu* with the suppression of the production of opium in China, and that thereby the British Government accepted the principle long maintained by the American Government in its treaties with China that the wishes of China in regard to the opium traffic should be met. It will be readily seen that the acceptance of Chapter IV of the International Opium Convention by the

⁴ *Vide, SUPPLEMENT*, Vol. 5, p. 238 (October, 1911).

⁵ *Vide, October*, p. 878.

treaty Powers represented at the conference broadens the comity between Great Britain and China, and will prevent any nation signatory to the convention taking unfair advantage of the special Anglo-Chinese agreement.

To continue an outline of the International Opium Convention, it may be stated that by Chapter V, composed of two articles, the contracting Powers agree to examine the possibility of enacting laws or regulations making the illegal possession of the drugs named in the convention liable to penalties unless existing laws or regulations have already done so; and they are to communicate to each other through the Netherlands ministry for foreign affairs the text of the laws and the administrative regulations which concern matters aimed at by the convention; also statistical information with respect to that which concerns the traffics covered by the convention.

But especially attention should be directed to Chapter VI of the convention containing its final provisions. This chapter, composed of Articles 22, 23, 24, and 25, marks a radical departure from final provisions as seen in any other international convention. It recognizes the futility of an attempt on the part of a minority of the Powers of the world to bring under control the international traffic in anything which may be produced or trafficked in by the nationals of any state, and would seem to have irretrievably determined that future international conferences, such as the International Opium Conference, must be composed of and its convention to be effective signed by an overwhelming majority of the states directly or indirectly interested. Nearly all international conventions similar to the opium convention heretofore signed have been signed by delegates of a comparatively small number of the major and minor states, and generally speaking, their final provisions have permitted of the adhesion of states not represented at the conference, and have provided for ratification by the signatory Powers in the shortest possible time—usually not to exceed two years.

The International Opium Conference had no sooner assembled than certain of the delegations pointed out that it would be useless for those states represented in the conference, and who were the largest producers and traders in opium, morphine, cocaine, etc., to agree to radical measures for the international control of these drugs, so long as it was open

to the nationals of those states not represented at the conference to continue or take up the production of and traffic in them.

It was contended by the American delegation, and they were not alone in this contention, that the International Opium Conference was composed of nations representative of the civilized world; therefore that the delegates should pledge their governments to the convention, and that the ordinary form of adhesion and ratification should be adopted as the final provisions of the convention. The American delegation was urged to this contention by the belief that those governments interested and not represented at the conference would soon adhere to what had been signed, as they had many times adhered to other conventions to which they were not directly signatory. But this view was not favored by a majority of the delegations present, and the conference finally decided, as provided by Article 22 of the convention, that the Powers not represented at the conference shall be permitted to sign the present convention, and that to this end the Netherlands Government shall invite immediately after the convention shall have been signed all the Powers of Europe and of America not represented at the conference (and then is enumerated the 34 other Powers of Europe and America) to designate a delegate armed with the full powers necessary for the signing of the convention at The Hague.

Article 22 proceeds to provide that the convention shall be furnished with the signatures of the other Powers by means of a "Protocol of signature of Powers not represented at the conference," to be added after the signatures of the Powers represented, and indicating the date of each signature; and that the Netherlands shall give a monthly notice to all the signatory Powers of each supplementary signature.

Article 23 provides that after all the Powers, as much for themselves as for their possessions, colonies, protectorates, and leased territories shall have signed the supplementary protocol of signatures, the Netherlands Government shall invite the Powers to ratify the convention, together with the protocol of signature.

In case the signature of all the Powers invited shall not have been secured by December 31, 1912, the Netherlands Government shall immediately invite all the Powers who have signed by that date to designate delegates to proceed to The Hague to examine into the pos-

sibility of nevertheless depositing their ratifications. Ratifications shall then be executed within as short a time as possible, and shall be deposited at once at The Hague in the ministry for foreign affairs. It is also provided that the Netherlands Government shall give notice to all the Powers who shall have ratified the convention, and of the date on which the last of such acts of ratification shall have been received.

By Article 24, it is provided that the convention shall go into effect three months after the date on which the Netherlands Government gives notice of ratification to the Powers, and again that all laws, regulations, and other measures provided for by the convention shall be drawn up not later than six months after the effectuation of the convention; it is further provided that these measures shall become operative subject to an agreement between the signatory Powers at the instance of the Netherlands Government.

It is important to notice that the last paragraph of Article 24 provides that in case questions shall arise relative to the ratification of the convention, for effectuation of the convention, or the effectuation of the laws, regulations, and measures which the convention involves, the Netherlands Government, if these questions shall not be decided by other means, shall invite all the signatory Powers to designate delegates who shall assemble at The Hague to come to an immediate agreement on these questions. This is a novel feature, and as it will be readily seen practically provides for an arbitration at The Hague of any disputes growing out of the terms of the convention.

Article 25 of the convention is common form, and contains the usual provision for denunciation, for the deposit of the convention, and for the transmission of certified copies of it to the Powers represented at the conference.

It may be stated that the novel final provisions of the convention were designed because of the difficulties connected with its Chapter III concerning morphine and cocaine. Chapters I and II concerning the production and traffic in raw and prepared opium and Chapter IV concerning China are composed of distinct pledges by the signatory Powers made on questions on which there was little or no disagreement, and to which it was thought the Powers not represented at the conference would readily adhere. Chapter III, on the other hand, deals with the question

of the traffic in morphine and cocaine, on which there was disagreement considerable enough to compel certain of the delegations to hold that the chapter could not be effectuated by the signatory Powers until it was subscribed to by the states not represented in the conference. Therefore the novel final provisions were designed because of the difficulties connected with the contents of Chapter III, and the ratification of the entire convention must now wait upon the necessary supplementary signatures of 34 other states.

Toward the end of the conference, and with the object of escaping this dilemma, the American delegation proposed that the convention should be broken in two parts—one to be composed of Chapters I, II, IV, and V, on the contents and strict pledges of which all the delegations were agreed, and to have as final articles the ordinary form of such articles in other conventions which provide for adhesion and ratification; the other convention to be composed of Chapters III and VI, the latter to contain the novel final articles as eventually adopted for the convention as it now stands. The American view, however, was not acceptable to a majority of the delegations, and therefore was not pressed.

In addition to the convention the delegates to the International Opium Conference signed a *protocole de clôture*, which contains the following views: That the conference is of the opinion that there is reason to draw the attention of the Universal Postal Union to the urgency of regulating the transmission by post of raw opium; to the necessity of regulating as far as possible the transmission by post of morphine and cocaine and their respective salts, and of the other substances contemplated by Article 14 of the convention; to the necessity of prohibiting the transmission of prepared opium by post and of the advisability of the study of the question of the Indian hemp drugs from the statistical and scientific standpoint with a view to regulating their misuse should the necessity thereof make itself felt.

Generally speaking, it may be said that the convention is satisfactory, and illustrates that the most powerful nations in the world are now agreed that an evil such as the opium evil is never wholly national in its incidence, can never be suppressed by two nations alone—as was supposed to be the case in regard to the Indo-Chinese opium traffic—

but that such an evil as it appears in one state is a concomitant or reflex of a similar evil in other states and is therefore international in its moral, humanitarian, economic, and diplomatic effect; that this being so, few evils can be eradicated by national action alone; and therefore only by the co-operation of all the states directly or indirectly interested can such an evil be mitigated or suppressed.

The convention marks a decided step in advance in the international movement for the suppression of the opium evil initiated by the United States. This movement at first was thought to concern only those countries of the Far East, or those western nations having territorial possessions in the Far East—five or six in number. But it has proceeded by way of a sober international commission of inquiry, composed of commissioners representing 13 nations, and by a conference composed of delegates with full powers representing 12 of these nations. These delegates having formulated and signed on behalf of their governments a convention containing strict pledges for national legislation and international co-operation, the convention has now been presented to the remaining states of Europe and America—34 in number—for their signature.

But, quite apart from the contents of the convention itself, the international movement initiated by the United States has had a directly beneficial effect on the interested nations, for, as already related, pending the assembling and action of the International Opium Commission, and while the diplomatic correspondence, aimed to secure The Hague conference, was in progress, many of the governments concerned perfected domestic legislation for the suppression of the evils connected with opium and other narcotics, and took measures concerning the export of these drugs which were of international significance.

By the final provisions of the convention contained in Chapter VI, there will probably be a delay of a year before the convention can be ratified by the signatory Powers and those Powers who agree to sign the protocol of supplementary signature. That, however, is of little moment compared to the new international comity which has been established by the document, and the furtherance by it of new principles of international commercial law; while the deduction may be made from Article 22 of the convention, that all future Hague conferences dealing with

matters of general international commerce must be composed of an overwhelming majority of the nations.

There is, however, one aspect from which the convention may be viewed that should be disquieting to the government and the people of the United States. It has just been stated that a reflex effect of the initiation by the United States of the international movement for the abatement of the opium evil took the form of improved domestic legislation in nearly all the countries concerned, of very drastic legislation in some, while one country at least—Great Britain—both by national and colonial law, effectuated resolution 4 of the International Opium Commission, as now embodied in Article 3 of the International Opium Convention.

The one nation which has not been vitally affected by the international movement initiated by the United States is the United States itself, except in the Philippines. In the islands there are model antinarcotic laws; but, in spite of repeated urging by the Executive, the Congress so far has failed favorably to consider carefully drafted measures aimed to bring the continental United States into line and in accord with the principles now embraced by the International Opium Convention. A good beginning was made by the Federal Government, as may be seen by reference to the opium act approved February 9, 1909. This act is imperfect—the only effect which it could possibly have being to prevent the legal importation into the United States of the vicious form of opium known as opium prepared for smoking.

The Federal Government legalized the importation of the latter form of opium by the tariff act of 1860, and from that year until the opium-exclusion act became effective on April 1, 1909, there were legally imported into the United States over 4,000,000 pounds of this debasing form of the drug on which the government collected a customs tax of nearly \$27,000,000. In addition to the legal importation from 1860 onward, almost half as much again of this form of opium is supposed to have been smuggled into the United States. The evils, economic as well as moral, associated with the importation and use of this form of the drug can not be accurately computed, but what might be called a studied underestimate of them was set forth in the report made on behalf of the American delegates to the International Opium Commission.⁶

⁶ *Vide*, Sen. Doc. No. 377. 61st Cong. 2nd Sess.

Just prior to the assembling of the International Opium Commission at Shanghai in February, 1909, it became apparent to the Department of State that the American Government had invited the co-operation of 12 nations to mitigate or suppress the opium evil as seen in Far Eastern countries, but had failed to recognize that it had legalized the importation of that form of the drug which had been most baneful in its effect on the people of China and of other Asiatic states. It was at once seen that it would be quite impossible for the American commissioners to appear at Shanghai until the Federal Government had taken some step toward a house cleaning. This was promptly done in part by the passage of the so-called opium-exclusion act just after the International Commission had convened.

Animated by the example of the Federal Government, some 30 of the states have improved the intrastate legislation aimed to confine narcotics to legitimate uses, but since February 9, 1909—the date of approval of the just mentioned act—no further decided Congressional action has been taken, and the United States is now in the position, after having received the cordial co-operation of 12 Powers, of being far behind in the movement to accomplish the purpose to which the American Government set itself in the autumn of 1906, when the first steps were taken to secure such international co-operation.

There is no doubt that during the sittings of the International Opium Conference at The Hague the American delegation was placed in a somewhat embarrassing position owing to the neglect of the Congress to pass legislation which had been urged upon it by the Executive, aimed to perfect the opium-exclusion act of February, 1909, and to bring under efficient control the export and interstate commerce in opium and other habit-forming drugs. Both formally and informally, it was pointed out to the American delegates at that conference that the other nations could have little hope for a final suppression of the opium and allied evils by international action so long as the United States, which had initiated the movement, failed to adopt the standard of national control in vogue in several European nations and in Japan.

Three bills with this purpose in view have been urged upon Congress since March, 1910. They are entitled as follows:

- (a) A bill to amend an act entitled "An act to prohibit the importa-

tion and use of opium for other than medicinal purposes," approved February 9, 1909;

(b) A bill to amend the act of October 1, 1890 (26 Stat., p. 1567) regulating the manufacture of smoking opium within the United States;

(c) A bill imposing a tax upon and regulating the production, manufacture, and distribution of certain habit-forming drugs.

A fourth bill has been designed to carry out the pledges of this government as contained in resolutions 8 and 9 of the International Opium Commission and as now pledged by this government by virtue of Article 16 of the International Opium Convention. The title of that bill is as follows:

(d) A bill to regulate the practice of pharmacy and the sale of poisons in the consular districts of the United States in China.

The bills (a), (b), (c), were drafted after a wide consultation with all the interests likely to be affected.⁷ They have the general support of the pharmacy boards of the different States of the Union which are charged with the enforcement, under the police power of the States, of the State acts for the regulation of pharmacy and the sale of narcotics; of the legislative committees of the National Druggists' Associations.

Since the adjournment of the International Opium Conference on the 23d of last January, these bills (a), (b), and (c), have been carefully revised by a joint committee composed of representatives of the Department of State and of the Treasury Department, and their speedy consideration has been urged upon the Congress by the Secretary of State and the Secretary of the Treasury. Finally, it may be stated that the President has commended to Congress, with his approval, the legislation in question.

First. By a message transmitting from the Secretary of State a report on the International Opium Commission and on the opium problem as seen within the United States and its possessions;⁸

Second. In his annual message to the Congress, December 7, 1910;

Third. In a special message to the Congress, transmitting a report of the Secretary of State relative to the control of the opium traffic;⁹ and

⁷ See S. Doc. No. 377, 61st Cong., 2d sess.

⁸ S. Doc. No. 377, 61st Cong., 2d sess.

⁹ S. Doc. No. 736, 61st Cong., 3d sess.

Fourth. In his message on foreign relations, communicated to the two Houses of Congress December 7, 1911.

It has been pointed out above that the United States had collected in customs duties, from 1860 until April 1, 1909, nearly \$27,000,000 from the legalized importation of that vicious form of opium known as opium prepared for smoking, and that the use of this drug within the United States had caused an economic and moral degradation which could not be accurately computed.

Since June, 1908, the Congress, on the request of the Executive, has appropriated \$45,000 to enable the government to secure international and national action for the mitigation or suppression of the evils connected with opium. Such international action has been secured at an expense wholly at variance with the large revenue which accrued to the government as the result of the legal importation of prepared opium. This supply of \$45,000 has been administered more than economically, and has enabled the government to support for four years a commission composed from time to time of from one to three members, to send three delegates to an International Opium Commission in the Far East, and later three delegates and the necessary secretaries to an International Opium Conference at The Hague. Therefore, it is the mature conclusion of those who have, under the Secretary of State, been intrusted with the work connected with the national and international aspects of the opium question that the Congress, having financially supported the Executive in its successful effort to ameliorate the international aspects of a great evil by the co-operation of 12 states extending over a period of four years, should speedily consider and pass the legislation so urgently needed to redeem the position of this government, and to place it in the advanced line achieved in domestic legislation by a majority of the interested nations, and now formally agreed to by a conference composed of the delegates of 12 states representing the highest civilization of the West and East.

One of the chief and more modern provisions of the International Opium Convention is Article 22, by which the Netherlands Government assumed the direct responsibility of inviting all the Powers of Europe and America not represented at the conference to sign the convention. An informal understanding was reached between the Minister for For-

eign Affairs of the Netherlands Government and the American delegation that the United States should assist in procuring the signatures of the Latin-American states to the convention. When this became known there were those amongst the delegates who seemed to believe that an onerous task had been placed upon the shoulders of our government. But such a belief has been blown to the winds by the ready response which the American and Netherlands Government have received from the Latin-American states to their overtures, for within six months of the signing of the convention at The Hague the following Latin-American Governments have deputed their diplomatic representatives to the Netherlands or to other European states to sign the convention: Brazil, Mexico, Guatemala, Panama, Ecuador, Honduras, Cuba, Costa Rica, Dominican Republic, Haiti, Salvador, Bolivia, Chile, Venezuela, Colombia, Uruguay, Argentina and Nicaragua. Peru and Paraguay will beyond a doubt soon sign the convention.

Several of these countries have large commercial interests at stake, but this government has received from all of them a tribute of admiration for its leadership in this great diplomatic, economic and moral reform.

A final word as to China: It was in essence the heroic resolve of the Chinese Government and people to stamp out their opium evil which induced the American Government to call the nations of the world together on the question. During the sittings of The Hague conference China was in the throes of her revolution. There were members of the conference who could not refrain from asking, Of what use is it for the Western Powers and Japan to support China in her crusade against opium when there is no assurance that the movement in the Empire will not break down with the departure of the Manchus? It is to the great credit of all the delegations that this view was never openly voiced on the floor of the conference, though it threaded disconnectedly through many minds. This was largely because the Chinese delegation itself made it evident that the opium reform was not spasmodic and a matter of authority, but genuine, and of and by the will of the people, and was perhaps the largest single factor of the past eight years in awakening Chinese minds to the possibilities of the rôle which their country might play in the social and economic progress of the modern world. Un-

doubtedly there has been a recrudescence of the production of opium in portions of China as the result of the laxity of government in certain of the provinces, due to the revolution. But that is only temporary. The great men of new China like Dr. Sun Yat Sen, President Yuan Shih Kai, and Vice-President Li Yuan Hung are determined that China shall not waver in her purpose to suppress the great national vice. This may best be realized by quoting a recent statement of Yuan Shih Kai on the question.

After referring to several other matters of reform, Yuan Shih Kai stated: "More important by far to the present generation of my people is the complete extermination of opium and the opium habit. China has been dying from this curse for more than half a century,—fifty-nine years ago to be exact. Her people, overcome by this vile drug, have been half asleep and have not known that they and their country were dying. Years ago the nation appealed for outside aid in its suppression, and the world knows what aid was rendered. The drug was forced upon us more than before. For nearly sixty years it has stood as a great crime of humanity. But we will stop it and free the land of the devouring scourge. Our National Assembly has already passed many laws regarding it, and these laws will be enforced. We are establishing an army, and that army will fight opium and opium smugglers on all the frontiers of land and sea, opium dealers and sub-dealers in all of the cities and towns, and opium users everywhere."

There can be no doubt that a great wrong was committed against China in permitting the influx of opium to her shores, at a time when it was known that her best men had set their faces steadily against it. It would be easy to blame some one nation for this; yet as a matter of fact there are but few nations whose subjects did not at one time or another take part in the trade. Happily, to-day the world has the best evidence possible, as contained in the International Opium Convention, that an old wrong will be atoned, and that one of the great factors in the difficult relations,—diplomatic, economic and otherwise,—between China and the West will soon be obliterated.

HAMILTON WRIGHT.

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EDITORIAL COMMENT

THE FINAL SETTLEMENT OF THE NORTH ATLANTIC COAST FISHERIES
CONTROVERSY

The final settlement of the century-old controversy between the United States and Great Britain over the rights of American fishermen in the coastal waters of Canada and Newfoundland, which were secured by the treaty of 1818, appears to be an accomplished fact, as a result of the agreement between the two governments, signed on July 20, 1912, the ratifications of which were exchanged on the 15th of November last.

The terms of this agreement appear in the SUPPLEMENT (page 41), and in an article in this number of the JOURNAL (page 1), Mr. Chandler P. Anderson, the agent of the United States in the arbitration of the

controversy, and who, as counselor of the Department of State, conducted the subsequent negotiations, gives a comprehensive review of the questions involved, the effect of the arbitral award, and the satisfactory conclusion reached through the agreement of July 20th.

In view of the previous articles and editorial comments which have already appeared in the *JOURNAL* in regard to the North Atlantic Coast Fisheries Arbitration, we shall here make reference only to the recent agreement and its effect upon the future relations of the two countries in regard to the fisheries.

In the award rendered at The Hague in September, 1910, not only were the disputed meanings of certain provisions in the treaty of 1818 determined by the arbitration and the general principles laid down for the exercise, by American fishermen, of their rights of fishery in British territorial waters, but the arbitrators, pursuant to the special agreement submitting the controversy to arbitration, made a series of recommendations for the consideration of the two governments as to measures giving practical effect to the award.

The recommendations related to the exercise of the sovereign right of Great Britain and the British colonies to regulate the conduct of the fisheries in their territorial waters, to which fishermen of the United States were by treaty entitled to resort, and also to the delimitation of the bays on the non-treaty coasts, within three marine miles of which Americans were debarred by treaty from taking fish.

In view of the fact that the interpretation of the word "bays" by the award was recognized to be difficult of direct application because of the indefiniteness of the standard of identification announced, the recommendations of the tribunal as to delimitation of the bays assume an added importance, since they undoubtedly embody the idea of the arbitrators as to how their interpretation should be applied in the case of each bay on the non-treaty coasts. However, as these practical applications of the award were only in the form of recommendations, they did not have the same binding force on the two governments as the declarations of the award proper. Though they presented a reasonable and equitable mode of settlement, they required the mutual consent of the parties to give them force.

The recommendations of the tribunal for a method of settling the respective rights of American fishermen and of the British colonial governments in the territorial waters of Canada and Newfoundland stood upon a different footing than the recommendations in regard to bays.

Throughout the controversy and in the argument at The Hague, the United States had maintained that, on account of the provisions of the treaty of 1818, the imperial and colonial governments were prohibited from putting into force any laws or regulations limiting the free exercise of American rights of fishery until their reasonableness had been admitted by the United States or had been declared by an impartial tribunal.

This contention, which amounted to a claim that Great Britain and her colonies must suspend the enforcement of their sovereign right of legislation until the character of the legislation could be tested by the standard of reasonableness, was vigorously opposed by Great Britain. However, the arbitrators, in seeking to furnish a practical method of harmonizing the respective rights of the parties, included in their award a recommendation to the two governments that the enforcement of fishery legislation should be suspended for a period of six months, in order that it might be passed upon by a mixed commission to determine whether it was or was not reasonable.

It is manifest that this latter recommendation could not be considered to be an application of the principles declared by the award since they, to all intents, were based upon the contention of the United States. They go no further than to suggest that Great Britain recede from her position and secure an amicable settlement by suspending the operation of legislation in accordance with the contention of the United States.

Whether or not these recommendations as to bays and fishery legislation were adopted without amendment by the two governments, it was essential that an agreement should be reached in order that the award should become effective and future disputes avoided. The recommendations offered a satisfactory basis for negotiating such an agreement, and within a few months after the rendition of the award, representatives of the two governments met in Washington to consider the terms of the agreement.

In regard to an acceptance of the tribunal's recommendations regarding the delimitation of the bays on the non-treaty coasts, the fact that they amounted to an interpretation by the arbitrators of their decision undoubtedly caused the conferees of both governments to view them with favor. Yet there was a difference in dealing with the recommendations delimiting the bays along the Canadian coasts and those affecting the bays along the non-treaty coasts of Newfoundland. The Canadian

bays had been from the very first a subject of dispute; in fact the American rights in these bays had been the chief cause of the long controversy. As a result, both sides thoroughly understood to what extent their material interests were at stake and how seriously they would be affected by adopting the recommendations of the tribunal. So far as the delimitation of these bays was concerned, the recommendations were incorporated in the agreement without modification.

As to the non-treaty bays of Newfoundland, the situation was different. The rights of American fishermen in them had never been a serious subject of controversy, and, as a consequence, no one could tell what effect on future conditions the adoption of the recommendations would have. It would appear that neither the representatives of the United States nor those of Newfoundland were willing to bind their governments in these circumstances. Furthermore, the marking of the bays was not a matter of present importance since existing conditions would be in no way affected. It was, therefore, determined, wisely it would seem, to defer action upon these particular recommendations until need for such action arose, and so the agreement provided. If later the question of rights in the bays of the non-treaty coasts of Newfoundland should arise, another agreement will undoubtedly have to be negotiated, the recommendations of the tribunal forming the basis of the negotiation. But, since the subject has not been discussed for the past hundred years and there does not appear at present any reason to believe that it will ever be a cause of disagreement, the need of a further agreement seems very remote.

Considering the apparent simplicity of agreeing upon a practical application of the award to the non-treaty bays, it is fair to conclude that the length of the negotiations, which extended over a year and a half, were due to the difficulty which was found in reaching an agreement as to a method for determining the reasonableness of fishery legislation affecting American rights in treaty waters, which would be just to both parties. To find some method which would protect the treaty rights of American fishermen from the immediate operation of inequitable legislation by the British colonial governments without infringing upon the sovereign rights of Great Britain to impose reasonable regulations upon those engaged in taking fish in the territorial waters of her colonies was the difficult task which presented itself to the negotiators, and which furnishes a sufficient explanation of the prolongation of the negotiation.

Mr. Anderson, in his article, explains with much detail the provisions finally agreed upon by the two governments to remove this idea of suspended legislation, which was so obnoxious to Great Britain as a limitation upon her sovereignty, and to retain the idea that there should be time given to the United States to examine new regulations and obtain a judicial decision upon their reasonableness before they were enforced against Americans exercising their treaty rights. The skill with which this was accomplished is most creditable to the negotiators of the recent agreement, and the mutual determination manifested by the United States and Great Britain to harmonize rights seemingly irreconcilable by bringing them into accord with the spirit of the award inspires confidence in the efficacy of arbitration even when the practical application of the principles affirmed by an arbitral tribunal is beyond its jurisdiction.

From the first step toward the submission of the fisheries dispute to the international court at The Hague down to the final settlement of the last points of difference by the agreement of July 20, 1912, the statesmen of the two countries have evinced an earnest desire to have this time-worn cause of irritation forever removed. That they have accomplished their purpose, after diplomacy had failed, through the channel of arbitration is an eminent triumph for that mode of settling international differences, however stubborn the litigants may have been in maintaining their positions through many years of controversy.

ELIHU ROOT BEFORE LATIN AMERICA

The *Cronista*, published at Tegucigalpa, Honduras, on October 26, 1912, contained an article entitled "Elihu Root before Latin America," purporting to reproduce in Spanish certain fragments from a recent speech of Mr. Root, who is described as "United States Senator, former Secretary of State, and one of the most eminent personalities of the Yankee country."

The *Cronista* attaches very great importance to this alleged speech, which, if authentic, ought, as it says, to be known in Central America. Mr. Root is made to say that our position in the Western Hemisphere is unique and without example in modern history; that the United States is a greater and nobler Rome, placed by God to act as arbitrator not only in the destinies of all America, but in Europe and Asia (why leave out

Africa?), that it is only a question of time until Mexico, Central America, and the islands which the United States still lacks in the Caribbean Sea shall fall beneath its flag; that the Latin Americans are unfit for self-government; and that progress is only possible in such quarters of the world under a protectorate of the United States.

It does not need Mr. Root's denial of these statements to stamp them as clumsy forgeries, for it is unthinkable that a former Secretary of State would be so undiplomatic as to express such views, even if he were base enough to hold them. Men in public life are accustomed to criticism of their motives as well as actions, and rarely dignify misrepresentations by taking note of them, much less by a formal repudiation of them. Senator Root's interest, however, in the welfare and progress of Latin America is so great and so keen that he has indignantly branded the assertions contained in the *Cronista* as utterly without foundation, as a failure to do so might in uninformed and prejudiced quarters either lead to the belief that he attached no great importance to the relations between Latin America and the United States, or that he was indifferent to the welfare and progress of the sister republics, which was a cardinal point of his policy when Secretary of State, and whose friend he has been in public office as in private life. Mr. Root therefore wrote and caused to be printed in the press of the United States the following letter, which was also sent through diplomatic channels to Honduras:

Washington, November 25th, 1912.

The newspaper, *El Cronista*, of Tegucigalpa, published on October 26, 1912, certain alleged extracts from some speech of mine.

These are impudent forgeries. I never made any such speech. I never said any such things, or wrote any such things. The expressions contained in these spurious and pretended extracts are inconsistent with my opinions, and abhorrent to my feelings. They are the exact opposite of the views which I have expressed on hundreds of occasions, during many years, both publicly and privately, officially and personally, and which I now hold and maintain.

(Signed) ELIHU ROOT.

To the friends of Latin America, both in the United States and in Latin America itself, these impudent forgeries, as Mr. Root properly terms them, must be a source of sorrow and regret, for there never has been an American statesman more genuinely interested in our neighbors to the South than Mr. Root. Through his forethought and initiative Latin America was invited to the Second Hague Peace Conference, where its delegates met and discussed on terms of equality the great

questions with which the conference was concerned, and came into close and intimate contact with the statesmen and publicists of Europe. This was no small service and would be of itself sufficient to show the appreciation and regard in which Mr. Root holds Latin America, and his desire to see it assume in the world the position to which it is justly entitled. But Mr. Root is not a disinterested observer of Latin America. First of American statesmen, he visited South America in the year 1906, attended the opening session of the Third Pan American Conference at Rio de Janeiro, on which occasion he delivered a notable address, and in the course of his travels delivered addresses in various parts of South America which could only have been pronounced by a sincere and generous friend of Latin America. In his address as Secretary of State and as Honorary President of the Third Conference, Mr. Root said:

We wish for no victories but those of peace; for no territory except our own; for no sovereignty except the sovereignty over ourselves. We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire, and we deem the observance of that respect the chief guaranty of the weak against the oppression of the strong. We neither claim nor desire any rights, or privileges, or powers that we do not freely concede to every American Republic. We wish to increase our prosperity, to expand our trade, to grow in wealth, in wisdom, and in spirit, but our conception of the true way to accomplish this is not to pull down others and profit by their ruin, but to help all friends to a common prosperity and a common growth, that we may all become greater and stronger together.

Such is the statesman, and such are the views then held and now solemnly reaffirmed by Mr. Root in his statement of November 25, 1912.

THE CASE OF RUSSIA AGAINST TURKEY AT THE HAGUE COURT OF ARBITRATION

On November 11, 1912, a temporary tribunal of arbitration sitting at The Hague rendered its award¹ (in this case properly termed a decision) in the controversy between Russia and Turkey regarding the payment of interest upon the indemnities due and overdue to Russian subjects for losses incurred during the Turko-Russian war of 1877-1878. The court held that Turkey was responsible for interest upon the sums overdue, as in the case of an ordinary debtor, but that interest would

¹ Printed in *Judicial Decisions*, p. 178.

only begin to run from the date of notification of default and the demand for interest. Inasmuch as Russia, after the demand for interest, accepted subsequent payments on account of the principal without mention of the interest due, the court held such conduct as tantamount to the withdrawal or renunciation of the claim for interest.

The opinion of the court is excellent, not only in the handling of facts but in the reasoning by which the judgment is reached and supported. Portions of the diplomatic correspondence necessary to elucidate the facts are quoted, arbitral awards in point are cited, the authority of writers on international law — especially Heffter — is invoked. The temporary tribunal appears to have acted under the sense of judicial responsibility. Its award is a judgment of a court, not a compromise of diplomatists, and is a model of what such decisions should be but rarely are. Such a result was not to be expected from the composition of the tribunal, for Russia appointed two of its subjects, Turkey appointed two of its subjects, and the umpire — Monsieur Lardy, doctor of laws, member and former president of the Institute of International law, envoy extraordinary and minister plenipotentiary of Switzerland at Paris, member of the Permanent Court of Arbitration — was the only stranger to the controversy. The decision evidently lay in his hands, and strong hands they must be to have dictated a decision impartial in every line, judicial in thought and expression, and without a trace of compromise.

Article 5 of the Treaty of Constantinople, concluded January 27/February 8, 1879, between Russia and Turkey, stipulated that "the claims of Russian subjects and institutions in Turkey for indemnity on account of damages sustained during the war shall be paid as soon as they are examined by the Russian Embassy at Constantinople and transmitted to the Sublime Porte. * * * Claims may be presented to the Sublime Porte beginning one year after the exchange of ratifications, and no claims will be admitted which are presented later than two years from that date."

The claims were duly examined by the Russian Embassy and presented by it to the Turkish Government, but the payments were delayed and only made under constant pressure from the Russian Government. The claims amounted in all to 6,186,543 francs, of which sum 50,000 Turkish pounds were paid in 1884, 50,000 in 1889, 75,000 in 1893, 50,000 in 1894, and a trifle over 42,438 in 1902, leaving a balance of 1,539 Turkish pounds, which the Turkish Government deposited in the Ottoman Bank to the credit of Russia, but which the latter refused to

receive on the ground that the interest which Russia claimed for the delayed payments had not been made. To recover this interest claimed by Russia and denied by Turkey a *compromis* was signed at Constantinople July 22/August 4, 1910, the third article of which stated the question to be arbitrated:²

- I. Whether or not the Imperial Ottoman Government is obliged to pay interest-damages to the Russian claimants by reason of the dates on which the said government made payment of the indemnities fixed, in execution of Article 5 of the treaty of January 27/February 8, 1879, as well as of the protocol of the same date?
- II. In case the first question is decided in the affirmative, what would be the amount of these interest-damages?

The Turkish Government presented a preliminary question, upon which it asked the judgment of the court which, if decided in its favor, would have been a bar to the action; namely, that the claims were due to certain specified subjects of Russia, not to the Russian Government, and that therefore Russia as such had no standing in the court. The tribunal properly found against Turkey, as the treaty was made with Russia for the benefit of its subjects. The court next took up the question as to whether Turkey was responsible for interest upon delay in the payment of the sums due, and, after careful argument by counsel and an examination of the principles of law by the court, it was held that Turkey was responsible, as a private debtor, for the payment of interest, but that it was only responsible after a demand for the payment of the principal and interest upon such principal. The court found that Russia had made the demand in proper form on December 31, 1890/January 12, 1891, and that therefore Turkey was responsible to Russia for interest upon the sums overdue from that date. In reaching this conclusion the court examined not merely principles of law, statements of accredited publicists, but the decisions of arbitral courts which were in point and were properly regarded as precedents. The judgment, therefore, would have been in favor of Russia, had it not been for the fact that subsequent to this date, the Russian Government, through its Embassy at Constantinople, repeatedly agreed to accept the balance as stated by Turkey, in which no interest was included. The court considered this to be a renunciation of the claim for interest put forward on December 31, 1890/January 12, 1891, and therefore rejected the claim for interest. On this point the court said:

² *Compromis* printed in SUPPLEMENT, p. 62.

When the Tribunal recognized that, according to the general principles and custom of public international law, there was a similarity of conditions between a state and an individual that are debtors for a clear and exigible conventional sum, it is equitable and juridical to apply also by analogy the principles of private law common to cases where the demand for payment is to be considered as eliminated and its benefits removed. In private law the effects of the demand for payment are removed when the creditor, after having made due demand for payment upon the debtor, grants one or several extensions for the fulfilment of the principal obligation, without reserving the rights acquired by the legal demand (Touiller-Duvergier, *Droit français*, vol. III, p. 159, No. 256), or again when "the creditor does not carry out the summons upon the debtor to pay," and "these principles apply to interest damages as well as to interest due because of the non-fulfilment of the obligation * * * or because of delay in its fulfilment." (Duranton, *Droit français*, X, p. 470; Aubry et Rau, *Droit Civil*, 1871, IV, p. 99; Berney, *De la demeure*, etc., Lausanne, 1886, p. 62; Windscheid, *Lehrbuch des Pandektenrechts*, 1879, p. 99; Demolombe X, p. 49; Larombière I, art. 1139, No. 22, etc.).

Between the Imperial Russian Government and the Sublime Porte, there was therefore a relinquishment of the interest on the part of Russia, since its embassy repeatedly accepted without discussion or reservation and mentioned again and again in its own diplomatic correspondence the amount of the balance of the indemnity as identical with the amount of the balance of the principal. In other words, the correspondence of the last few years establishes the fact that the two parties interpreted the acts of 1879 as implying that the payment of the balance of the principal was identical with the payment of the balance to which the claimants had a right, which implied the relinquishment of interest or moratory interest-damages.

The Imperial Russian Government cannot, after the principal has been paid in its entirety or placed at its disposal, validly bring up again in a one-sided manner an interpretation which has been accepted and practised in its name by its embassy.

The court therefore held that "a negative reply is made to Question No. 1 in Article 3 of the *compromis*," before quoted.

EFFECTS OF WAR UPON TREATIES AND INTERNATIONAL CONVENTIONS.
A PROJECT ADOPTED BY THE INSTITUTE OF INTERNATIONAL LAW AT
ITS SESSION IN CHRISTIANIA, IN AUGUST, 1912

The rule of international law which determines the treaty obligations of belligerents at the outbreak of war — if such a rule can be said to exist — is by no means easy to formulate; indeed, the practice of most states in that regard has been so uncertain and wanting in uniformity as to leave no course open to the conscientious text writer save to attempt a grouping of the treaties themselves; the arrangement of those which stand or fall depending, to some extent, upon the instruments in force at the date of belligerency and, to some extent, also, upon the attitude of

the belligerent himself toward treaty stipulations in general. While it is impossible, at the present time, to state a rule of general international obligation in that regard, it is safe to say that the beginnings of such a rule can be gleaned from the practice of belligerents, not only before the outbreak of hostilities but during their continuance.

Of the undertakings which are conceded to survive the outbreak of war we may mention those entered into in contemplation of war and intended, to a greater or less extent, to regulate its operations. In this class belong the Declaration of Paris of 1856, the Saint Petersburg Declaration of 1868, the Geneva Conventions of 1864, 1868 and 1906 and the Hague Conventions of 1899 and 1907: in this category, also, falls the Declaration of London of 1907. It is only when the entire body of treaty relations between the belligerents is considered that doubt arises as to the particular undertakings which are, and those which are not, affected by the outbreak of hostilities.

But even here the beginnings of a rule are apparent. Agreements that contemplate the continued existence of normal peaceful relations between the parties, such as those, for example, which regulate commercial intercourse, tariff concessions, immigration and naturalization treaties, postal conventions, extradition agreements and the like, are obviously deprived of their obligatory force by the outbreak of war — this because they contemplate acts of uninterrupted international intercourse which are absolutely terminated in the operation of the ancient rule that puts an end to all peaceful intercourse between belligerents in time of war.

But there are other classes of treaties which are not affected by the changed relations of the belligerent states. Such are boundary treaties, treaties of cession and the like, which represent completed acts, and are embodied in instruments which have some points in common with executed contracts. These are generally conceded to be unaffected by the fact of war. It is true that the boundaries of the hostile states may be changed as a result of the military operations, and that territory, including that formerly ceded, may be acquired by the successful belligerent, but such changes result from the fortune of war and are not due to the old boundary treaties, or acts of cession; the incidents of the transfer being embodied in the treaty of peace which terminates the operations of war and places the belligerent upon a new footing of peace and amity.

In the draft project which was adopted by the Institute of Interna-

tional Law at its session in Christiania in August last¹ we have a definite and comprehensive scheme, prepared by the highest technical authority, and now submitted to the Powers for adoption. It will be conceded, I am sure, that the subject-matter of the project is of the very first importance, well worthy of the expert consideration of the Institute of International Law. The inherent difficulties which stood in the way of such an undertaking were fully understood and appreciated by the membership of that body, and no efforts were spared in the preparation of a scheme that should commend itself to the states of the civilized world, and be regarded by them as worthy of consideration with a view to its adoption in conventional form.

The project of the Institute is embodied in eleven articles, which are grouped in two chapters. In Article I the general proposition is advanced that the existence of war does not impair the binding force of treaties previously concluded between the belligerents. In other words, all treaties continue to have obligatory force in time of war save those mentioned in subsequent clauses of the project. When the field of application of the project is considered, there would seem to be some ground for the belief that a rule stated in an opposite sense and declaring that all treaties are abrogated by war would be quite as true and, possibly, of easier and more general application. The Institute has chosen otherwise, however, and the examination of the excepting clauses will now be proceeded with.

In the remaining articles of the chapter an enumeration is attempted of the treaties which are terminated by the belligerency of the parties. Among those which are held to be so terminated are those creating "international associations," protectorates, including agreements in respect to the supervision of external or internal administration, treaties of alliance, guaranty and subsidy, to which are added treaties establishing "spheres of influence" and, finally, treaties of a "public nature generally," — a term of very general application and calculated to include most international undertakings within its scope. It will also be noted that the project is silent as to the nature and character of the "associations" which are terminated by the outbreak of war between the signatory parties. In paragraph two of Article II abrogation takes place in respect to any treaty the operation of which has been the direct cause of the war, as evidence by an official act of either belligerent prior to the outbreak of the war.

¹ Printed at the end of this comment.

Article III follows as a necessary consequence upon the adoption of the preceding article and contains the requirement that, in determining the question of belligerency, the entire body of the treaty shall be considered. If a particular instrument contains clauses capable of being arranged under any of the heads mentioned in Article II, abrogation will result. If the treaty contains such stipulations, and constitutes an indivisible whole, the entire instrument loses its obligatory force at the outbreak of hostilities. Article IV, which contains provisions governing the treaty relations of the belligerents during the continuance of the war, has an important requirement in respect to such observance and provides, as to the surviving clauses, that, in spite of the hostilities, their execution must "be observed as in the past." It will be observed that the execution of the surviving agreements seems to differ, in some respects, from those — like the several Hague Conventions for example, which only come into operation at the beginning of hostilities, in that the former are to receive execution at the hands of the belligerents unless such execution is prevented by military necessity. The execution of treaties which come into operation in time of war is specially provided for in a clause which is embodied in Article V.

In Article IV the attempt is made to give effect to the articles which precede it as rules of interpretation in treaties of peace, where they may be resorted to with a view to supply omissions. A more important clause, however, is that in which the effort is made to dispose of treaty obligations which are outstanding at the outbreak of war. In the operation of this clause certain prior treaties are annulled and certain others are abrogated; it is provided, however, that this requirement has no retrospective operation as to "effects produced in the past."

In Chapter 2 some consideration is given to treaties between the belligerents and third parties, by the insertion of a general provision in Article VII that the requirements of the first six articles shall apply to treaty relations between the belligerents and third states, with certain reservations which constitute the subject-matter of Articles VIII to XI. The first of these reservations applies to a class of undertakings to which belligerents are parties and which have the same object as their obligations to third states: these are required to be executed in the interest of third parties: the illustration given is that of a collateral treaty of guarantee, which remains in force in spite of the fact that war has broken out between two of the guarantors. This would seem to be the case of Belgium and Switzerland.

Article IX provides that collective agreements continue in force in the relations of the belligerents with other Powers, and cannot be altered in the treaty of peace to the disadvantage of such third Power, without its participation or consent. Indeed Articles X and XI are, in substance, restatements of existing law. The former provides that treaties between belligerents and third states are not affected by war; the latter contains the requirement that treaties governing the operations of war apply only in the case in which both of the belligerents are signatory parties, unless a contrary stipulation or other provision exists which leaves no doubt as to the intention of the parties.

It has been seen that the field covered by the project is one that, under the existing rules of international law, is to an unusual degree uncertain and, for that reason, unsatisfactory. The project submitted by the Institute of International Law does something to remedy this state of affairs, and is to that extent deserving of praise. But the project itself is to some extent wanting in that clearness and precision which an instrument should possess which is offered to the world with a view to remedy defects which are admitted to exist in an important branch of the law of nations.

*Project of the Institute of International Law, Adopted at its Session in Christiania,
August, 1912.*

EFFECTS OF WAR UPON TREATIES AND INTERNATIONAL CONVENTIONS

CHAPTER I

Treaties between Belligerent States

ARTICLE I

The outbreak and continuance of hostilities do not impair the force of treaties, conventions and agreements concluded by belligerents with each other, whatever may be their wording and object.

ARTICLE II

Nevertheless war rightfully puts an end to:

1. Agreements of international associations; treaties establishing a protectorate and supervision; treaties of alliance, of guarantee, of subsidy; treaties providing a right of security or a sphere of influence; and treaties of a public nature generally.
2. Every treaty, the application or interpretation of which may have been the direct cause of the war, according to the official acts of one of the governments before the outbreak of hostilities.

ARTICLE III

In the application of the rule established in Article II, the content of the treaty must be taken into account. If there are clauses of differing purport in the same instrument, only those will be considered annulled which come under the categories enumerated in Article II. Nevertheless, the entire treaty will become void, when it possesses the character of an indivisible document.

ARTICLE IV

Treaties remaining in force, the execution of which persists in spite of the hostilities, must be observed as in the past. Belligerent states can disregard them only in so far and as long as the necessities of war require such a course.

ARTICLE V

Articles II, III and IV do not refer to treaties concluded in consideration of the war.

ARTICLE VI

Aside from the responsibility which the violation of these rules would entail, the rules mentioned in the preceding articles shall serve to interpret and to supply any omissions in a treaty of peace.

Hence, if there is no formal clause in the treaty of peace, it shall be considered that:

1. Treaties affected by war are definitively annulled;
2. Treaties not affected by war, whether they have been suspended or not during the course of hostilities, are tacitly confirmed;
3. Treaties, however, whose clauses conflict with the provisions of the treaty of peace, are implicitly abrogated.
4. The abrogation of a treaty, formal or tacit, does not affect retroactively the effects produced in the past by the abrogated text.

CHAPTER II*Treaties between Belligerent States and Third States***ARTICLE VII**

The provisions of Articles I to VI apply, in the relations of belligerent states, to the treaties concluded between them and third states, with the following reservations:

ARTICLE VIII

When the obligations which bind belligerent states have the same object as their obligations to third states, they must be executed in the interest of the latter. Thus, collective treaties of guarantee remain in force, *in spite* of the war which has broken out between two of the contracting states.

ARTICLE IX

Collective agreements remain in force in the relations of each of the belligerent states with third contracting states. They cannot be altered by the treaty of peace to the prejudice of third contracting states without the participation or the consent of the latter.

ARTICLE X

Treaties concluded between a belligerent state and third states are not affected by war.

ARTICLE XI

If there is no formal clause to the contrary or a provision which leaves no doubt as to the intention of the parties, collective treaties concerning the law of war apply only if all the belligerents are parties to the convention.

PEACE BETWEEN ITALY AND TURKEY

On October 18, 1912, the war between Italy and Turkey was ended by the conclusion of the treaty of peace signed at Lausanne, Switzerland, and, so far as Turkey is concerned, the two countries are at peace, although, as the January number of the JOURNAL goes to press, Turkey is unfortunately still at war with the Balkan States. It was a foregone conclusion that Tripoli and Cyrenaica would remain in the possession of Italy, but the formal treaty of peace neither cedes the provinces to Italy nor recognizes in express terms the transfer of sovereignty which, in so far as Italy was concerned, had already taken place. Shortly after the outbreak of war on September 29, 1911, the Italian Government, by formal decree of November 5, 1911, and by act of parliament of February 25, 1912, declared Tripolitana and Cyrenaica under the full and complete sovereignty of the Kingdom of Italy.

Article 1 provides for an immediate and simultaneous cessation of hostilities upon the signing of the treaty, and Article 3 that the prisoners of war and hostages shall be exchanged in the shortest possible time. Tripoli and Cyrenaica are dealt with in Articles 2 and 4. Thus, Article 2 stipulates:

After the signing of the present treaty, the two governments pledge themselves to issue orders immediately for the recall of their officers and troops, and their civilian employees, that is to say, the Ottoman Government will recall these officers, troops and civilian employees from Tripoli and Cyrenaica, and the Italian Government from the islands occupied by Italy in the Aegean Sea, respectively.

That is to say, Turkish officials of all kinds are to leave Tripoli and Cyrenaica, and the Italian Government is to evacuate the islands in the Ægean which it has occupied. But a second and concluding paragraph of Article 2 makes the evacuation of the islands contingent upon the previous evacuation by Turkey of Tripoli and Cyrenaica.

In the absence of official documents, it is impossible to say whether Italy was unwilling to have its decree of annexation questioned or formally recognized by an express stipulation of the treaty, or that Turkey was unwilling, as conjectured by the *London Times*, to violate "the letter of the Coran law, which forbids the cession of lands of the Caliph to the Infidel." The meaning of the article, however, is perfectly clear. The Italian decree of annexation stands unquestioned, and the evacuation of Tripoli and Cyrenaica is due to the fact that by such decree the provinces in question have been "placed under the full and complete sovereignty of the Kingdom of Italy."

Article 4 endeavors to place those who took part or were concerned in the war in the position in which they would have been, had it not broken out. Thus,

The two governments pledge themselves to grant full and absolute amnesty, the Royal Government to the inhabitants of Tripoli and Cyrenaica, and the Imperial Government to the inhabitants of the islands in the Ægean Sea subject to Ottoman sovereignty, who took part in the hostilities and those who may have compromised themselves as a result thereof, excepting offenses against the common law. In consequence, no person, to whatever class or condition he may belong, shall be prosecuted or molested in his person or property, or in the exercise of his rights by reason of his political or military acts, or for opinions expressed during the hostilities. All persons detained and deported on such grounds shall be released immediately.

Article 9 of the treaty may be regarded as a continuation of Article 4. Thus,

The Ottoman Government, wishing to show its satisfaction for the good and loyal service which it received from the Italian subjects employed in the administrations and whom it found itself compelled to dismiss at the time of the hostilities, declares itself ready to reinstate them in the positions which they had left.

An allowance shall be paid to them for the months during which they were not employed, and this interruption of service shall cause no prejudice to those of the said employees who would be entitled to a pension on account of length of service.

In addition, the Ottoman Government pledges itself to use its good offices with the institutions with which it is connected (public debt, railroad companies, banks, etc.) to the end that they may act in the same manner toward the Italian subjects who were in their service and are in a similar situation.

Article 10 deals directly with the liabilities which Italy assumes by virtue of the annexation of the two provinces, and should be read in connection with Article 2 dealing with their evacuation, as this act on the part of Turkey is tantamount to a recognition of Italian sovereignty over them. Thus,

The Italian Government pledges itself to pay annually to the treasury of the public debt, for the Imperial Government, a sum corresponding to the average of the sums which in each of the three years preceding that of the declaration of war have been assigned to the service of the public debt under the revenues of the two provinces. The amount of the said annuity shall be determined by mutual accord of two commissioners, one of whom is to be designated by the Royal Government, the other by the Imperial Government. In case of disagreement, the decision shall be submitted to an arbitral commission composed of the said commissioners and an umpire designated by mutual agreement of the two parties. If the agreement cannot be reached, each of the parties shall designate a different Power and the selection of the umpire shall be made jointly by the Powers thus designated.

The Royal Government, as well as the administration of the Ottoman public debt through the medium of the Imperial Government, shall have the right to request, in place of the aforementioned annuity, a single payment of a corresponding sum, capitalized at 4%.

In reference to the preceding paragraph, the Royal Government now acknowledges that the annuity cannot be less than two million Italian lire, and that it is ready to pay to the administration of the public debt the corresponding capitalized sum as soon as the demand for it is presented.

It is a moot question in international law whether war merely suspends or abrogates treaties existing at its outbreak. The contracting parties wisely determined that no doubt or ambiguity should exist upon this subject by providing in Article 5 that:

All the treaties, conventions and engagements of any kind, sort and nature, concluded or in force between the two high contracting parties before the declaration of war shall again enter into immediate effect, and the two governments, as also their respective subjects shall be placed toward one another in the identical situation in which they were before the outbreak of hostilities.

Such are the main provisions of the treaty of Lausanne of October 18, 1912. The remaining articles are of very considerable importance to both of the countries, but, as they are not directly connected with the war, although they are the result of it, the reader is referred to the full text, which appears in the **SUPPLEMENT** accompanying the present number of the **JOURNAL**.¹ It should be said, however, that Italy consents to certain

¹ Page 58.

modifications of Turkey's commercial policy and agrees to the abrogation of the capitulatory régime, provided agreements be negotiated by Turkey with the Powers enjoying the benefit of the capitulations.

Without further commenting upon the treaty or entering into the causes of the war, which have been stated in a previous number of the JOURNAL, it is clear that Italy has accomplished her purpose, namely, the acquisition of Tripoli and Cyrenaica. That she may wisely administer these provinces and, by the benefits conferred upon them, make amends as far as possible for the lawless manner of acquiring them, is now the hope of those who believe that the war against Turkey for their acquisition was as unjustifiable in law as it was in morals and fair dealing.

THE CHINESE SOCIETY AND JOURNAL OF INTERNATIONAL LAW

In the *Peking Daily News* of November 7 and 8, 1912, there are two exceedingly interesting articles entitled "The New Spirit in Chinese Diplomacy," which will not merely interest the readers of the JOURNAL, but will be a source of satisfaction to those who believe that the diffusion of international law and its application by nations are factors of the greatest moment not only in international organization, but in the movement for international peace. The articles call attention to the fact that the Wai-chiao Pu, the Chinese Foreign Office, has been reorganized in such a manner that "responsibility has been centered on a single head instead of half a dozen co-ordinate chiefs"; that "all the members of the ministry, from the minister down to the junior assistant, excepting possibly one or two of them, are able to speak at least one foreign language"; that a commission for the study of treaties has been formed, composed "of a councillor, a secretary, three senior assistants and two junior assistants of the ministry, chosen solely because of their experience in the field of research"; that the commission thus constituted "holds its meetings three times a week to discuss the results of study and research of the various questions of law and treaty which are entrusted to it for advice."

The editorial assigns the credit of founding this institution to Mr. Lou Tseng-Tsiang, the former minister of foreign affairs, and Dr. W. W. Yen, the Vice-Minister, "whose keen insight into the fundamentals of successful diplomacy enable them to perceive the wisdom and necessity of having such a body as the commission under notice. But its continued

usefulness, however, is also due to the sympathetic approval and support which Mr. Liang Meng-ting, the present Minister, is extending to it. The members of the commission enjoy the confidence of the Minister and the Vice-Minister; and every facility of access to the archives of the Ministry is willingly afforded them."

It is interesting to note that Mr. Lou Tseng-Tsiang was Chinese delegate to the First and Second Hague Peace Conferences; that he was Minister to Belgium and Ambassador to Russia before becoming Minister of Foreign Affairs, so that he was able from his personal experience and knowledge of affairs to know the needs of a foreign office, and the creation of the republic enabled him, as its Minister of Foreign Affairs, to carry his views into effect. It will particularly interest our readers to learn that Dr. W. W. Yen is a young Chinese scholar of exceptional attainments, who was educated in the United States, and that he is a member of the American Society of International Law.

But the enlightened statesmen of the republic recognize that it is not enough to have a foreign office comparable in organization and efficiency to the foreign offices of European civilization, for the conduct of international relations. They recognize that the principles of international law must be studied and mastered by leaders of thought, and that appropriate organs should be created for their study and dissemination. Therefore a society has been organized in Shanghai "for the purpose of studying and examining the theories of foreign international jurists, the history of the past, the questions of the day, and the problems of the future, with a view to the determination of the legal principles involved therein." The writer of the article states that, "Like the American Society of International Law and the International Law Association in England, this new organization proposes to take in a large number of people, the sole qualification prescribed for admission to membership therein being 'interest in the study of international law.'"

The organization of the society in Shanghai, which occurred some months ago, has evidently met with approval, for in the second article in the *Peking Daily News*, to which reference has been made, we are informed that a society for the study of international law has been formed in Peking, somewhat similar to the society at Shanghai. The moving spirits of this new society are Mr. Lou Tseng-Tsiang, formerly prime minister and minister of foreign affairs, and Mr. Chang Chien. The Peking society is organized upon a scientific basis. Thus, Article 4 of its constitution declares its objects to be: "The study of international

law and the maintenance of international peace on the foundation of law and justice"; and restricts membership to (1) graduates of a course in law or political science in a Chinese or foreign university; (2) experienced diplomats; (3) authors of works on or related to international law. The Institute of International Law is evidently taken as the model in determining the qualifications for membership, but it would appear from the article that, while limited to persons technically qualified, its founders have not made it a close corporation but intend to open it to all, not merely a certain number of those qualified for admission. Serious investigations are to be undertaken and will be placed in charge of a general director, aided by four assistant directors. As in the case of the Institute, any member may be assigned to a particular topic, but, differing from the Institute, he may select one of his own choice and devote himself to its study. In order to popularize the results of the investigations, a quarterly journal is to be established by the society, to be directed by an editor-in-chief and four associate editors.

The society is to have a library of important collections of treaties and works relating to international law, and it is gratifying to learn that "a substantial fund" has already been raised for this purpose. That the undertaking is serious and deserving of respect and that the society will be conducted in such a manner as to accomplish its purposes, appear from the following extract from the *Peking Daily News*:

Among the two-score of its members are such well-known personages as the two ex-Premiers of the Republic, Mr. Tang Shao-ji and Mr. Lou Tseng-tsiang; Dr. Wang Chung-hui, Minister of Foreign Affairs in the Nanking Government; Mr. Hu Wei-teh, formerly Minister to Japan and Russia and some time acting Minister of Foreign Affairs; Mr. Sun Pao-chi, formerly Minister to Germany; Mr. Chang Chien, the noted Chinese scholar; Mr. Ma Liang, President of the National University; Mr. Alfred Sze, at one time Minister-appoint to the United States; Dr. W. W. Yen, present Vice-Minister of Foreign Affairs, etc. Besides these, there are in the list of members also Chinese jurists, lawyers, legislators and special students of international law.

The American Society of International Law and the Editorial Board of the **AMERICAN JOURNAL OF INTERNATIONAL LAW** extend their sincere congratulations to the enlightened statesmen, jurists and publicists, who have reorganized the Ministry of Foreign Affairs, who have created a society for "the study of international law and the maintenance of international peace on the foundations of law and justice," and have established as the organ of the society a quarterly journal of international

law. That their endeavors be crowned with complete success must be the wish of all who are interested in the study of international law and the maintenance of international peace on the foundations of law and justice.

GOVERNMENT MONOPOLY OF WAR INDUSTRIES

In an interesting communication addressed to the *New York Times* and printed in its issue of October 20, 1912, Mr. J. P. de Souza Dantas, first secretary of the Brazilian Legation at Paris, proposes "the nationalization of war industries and state monopoly of all enterprises dealing with the construction of armaments and engines of war." He states that the reform would only be possible through an international agreement, but that, if the United States "would take the lead in negotiating a treaty between the six or seven great countries in which the war industries flourish, with a view to creating such a state monopoly," he believes "that the first and most important step toward universal peace would have been made." He felt that other Powers would join the six or seven parties to the international agreement, and that instead of starting manufactories of their own they would "become the customers of one or others of the countries already manufacturing, according to their reasons for special preference."

Mr. de Souza Dantas is aware of the many difficulties which stand in the way of realizing his proposal, but he observes that all recommendations of this kind are bound to meet with opposition both from interested manufacturers, who would lose financially by the establishment of government monopolies, and from those classes who object on principle to the government going into business which heretofore has been carried on by private parties. Without discussing European conditions, with which the writer of the present comment is not sufficiently familiar, it is difficult to see how the United States could justify itself in calling an international conference to discuss this matter, as Mr. de Souza Dantas proposes, when the difficulties in the way of executing the agreement, supposing it could be negotiated, would be, at least for the present, apparently insuperable. Heretofore the United States has had its vessels of war constructed by contract with ship-builders, although the experiment has been made of constructing vessels of war in federal navy yards. But the proposition does not stop here. Not merely is the government requested to take over the "construction

of armaments and engines of war," but war industries as such are to be nationalized and conducted by the government. Supposing that there were no constitutional objections to the proposed plan, it is doubtful whether our people, who oppose the construction of two battleships a year, would be willing to appropriate the money needed to equip navy yards with the machinery necessary to construct vessels of war, for by so doing the government would necessarily have freer initiative in planning and constructing such vessels. It is no doubt true, as Mr. de Souza Dantas states, that manufacturers of war material endeavor to create a market for their wares, which would not be the case if they were not actively engaged in the business. But it is questionable whether nations would be willing to change existing principles of international law to the extent that would be required, even although they might not be unwilling to discuss the project, for materials of war may be manufactured and sold to belligerents, although as contraband they run the risk of capture and confiscation. If the manufacturers of war materials, using the term in its largest and most comprehensive sense, were government agencies, nations would be unable to dispose of their war materials during hostilities to belligerents, as sales of government property by a government under such circumstances are forbidden by international law.

The result would be that nations which do not manufacture their own war materials would have to have on hand a plentiful supply of them and would be obliged to make very elaborate preparations in time of peace for a future war, the outbreak and extent of which they could not well forecast. In the next place, even those nations which manufacture war materials would have to have their arsenals well supplied, as they would have to rely upon their own resources and could not replete their stores by purchase on the market.

If it be true that the possession of war materials and an equipped navy incline a nation to make use of the materials and of its fleet, it would appear that Mr. de Souza Dantas' proposal would not promote the cause of peace to the extent which he anticipates. Add to this the difficulty of procuring an agreement upon principles of international law and the inherent difficulties of the project, at least so far as the United States is concerned, it would seem that, however interesting it may be in itself, it will nevertheless fail to commend itself either to the nations at large or to the United States.

THE AMERICAN INSTITUTE OF INTERNATIONAL LAW

In the last number of the JOURNAL a comment appeared giving the aims and purposes of the proposed American Institute of International Law and stating the progress which had been made toward its organization. The proposal to create such an institution was well received by the publicists of every Latin American state, as well as by a large number of European publicists, members of the Institute of International Law. The constitution and by-laws were approved by the publicists of the different American countries to which they were sent, so that on October 12, 1912, the proposers of the Institute, who were then in Washington, felt themselves justified in declaring it founded as of the date of October 12, 1912.

The officers of the American Institute were selected to serve until the first meeting, which it is expected will be held in Washington as soon as the difficulties incident to the arrangement of such a meeting and the great distances which its members will have to travel will permit. The officers are Mr. Elihu Root (United States) Honorary President; Mr. James Brown Scott (United States) President; Mr. Alejandro Alvarez (Chile) Secretary General; Mr. Luis Anderson (Costa Rica) Treasurer.

It was thought advisable to issue a circular letter to the publicists of the American republics who had collaborated in the organization of the American Institute, which should state not merely the steps preliminary to its foundation, but put in definite and final form the aims and purposes which the proposers had in view and which, with the co-operation of the members, can, it is believed, be largely, if not wholly, realized. This circular letter is appended without comment to the present brief notice, in order that the English readers of the JOURNAL, as well as those who receive the Spanish edition, may have accurate knowledge of the Institute which has been created and which, it is hoped, will be a factor not merely in the development of international law and the dissemination of its principles, but also in drawing together in harmonious co-operation the publicists of Pan-America.

AMERICAN INSTITUTE OF INTERNATIONAL LAW

[Translation]

Dear Sir and Colleague:

Washington, D. C., *October 12, 1912.*

On October 10, 1911, a confidential note was addressed to a certain number of publicists of the American nations, in order to learn their opinion upon the time-

liness of founding an American Institute of International Law. The idea of creating such an Institute was everywhere received with enthusiasm. It was likewise cordially welcomed in Europe by eminent authorities on international law, and their approval was a source of the greatest encouragement to us. Under date of July 4, 1912, a draft constitution and set of by-laws were laid before the American publicists. With this document there was sent a new circular, requesting them to inform us of their full and complete adherence. It was not long before they so informed us. Encouraged by this success and confident of the future, we have therefore decided to set to work without further delay.

A first step was necessary: we have just taken it. On October 12, 1912, the American Institute of International Law was declared founded at Washington.

But it is not sufficient to create an institution; the task to be accomplished must be determined, the road to be followed must be laid out. In our first note we sketched the aim of the new institution; it seems to us advisable to mention it again and to lay before you the program which, in our opinion, this aim requires us to carry out.

I

The object of the American Institute of International Law is to realize an aspiration which has always dominated the political life of the states of the New World: to find the means of assuring peace and to tighten the bonds of solidarity which nature and history have created between these states. It is a stupendous piece of work and a difficult task, but the progress and evolution of the American countries in international life will aid us.

This aspiration toward the reign of peace is now universal. And the nations across the seas are united by it in a common desire for its realization.

It is a commonplace that the best way to obtain peace is to instruct and strengthen public opinion in the sense of justice, as well as to subject existing international relations to juridical regulation. But how to conceive and give the proper direction to this regulation?

The complexity of the problems which are foremost in the life of nations henceforth gives a new direction to international law. The relations between states are no longer, as formerly, of an individualistic or metaphysical character. There is a desire to determine in a uniform manner principles which are to-day indefinite or divergent. This determination is brought about according to the ideas of existing relations, keeping in mind, however, the progress and improvements which civilization permits.

These characteristics of international law are in very great evidence in the activities of the international peace conferences which met at The Hague in 1899 and 1907, the latter of which had brought together nearly all the states of the world. After having established the principle that they desired "to extend the empire of law and strengthen the sense of international justice" (preamble to the convention for the peaceful settlement of international disputes), they recognized (a fact which is more important) that in default of juridical principles, there should be recourse first to the principles of international law, and, in their default, to the general principles of justice and equity [preamble to the convention concerning the laws and customs of land warfare (1907), and convention relative to the establishment of an international prize court (1907), Art. 7, section 2].

The states of America, perhaps more than the states of Europe, have endeavored to bring about, by means of conventions, uniformity in the principles of international law. In their agreements they have always been inspired by the ideas of their political life and liberal, just and fraternal principles. Their desire for a codification of international law recently reached the starting-point of its accomplishment. In the month of June last, a conference of jurisconsults took place at Rio de Janeiro which, after having decided upon the basis of preliminary work, resolved itself into several commissions in order to strive in all conscience for the accomplishment of the work undertaken.

II

Given the direction of modern international law, the institutions which devote themselves to the study of this law should necessarily take as a guide for their labors this tendency arising from the unanimous will of the states.

The new Institute purposes in the first place to aid in the scientific development of international law by taking the initiative in establishing its principles and determining its rules, which are to-day vague or ill-defined, and even non-existent. It will endeavor in this regulation, to meet the exigencies of the life of nations and the idea of justice and solidarity.

It will strive also to assure, as much as possible, a unity of thought upon these matters, especially among the American nations. Will not this unity be the happiest prelude to the general agreement of the states, without distinction of continent?

An eminent jurisconsult, who from the very beginning has lent his aid to our undertaking in order to present it to the European public, has very justly said:

The Second Peace Conference, by calling to The Hague all the states of America, established the fact that they did not agree upon certain points. All of them have not the same conception either of the law of peace or of the law of war. But how can Europe be persuaded of the correctness of American views, if America is not already previously convinced? And, on the other hand, with what authority will not American propositions be clothed when they proceed, not from such and such a state, but from America as a whole, who, having studied them in the American Institute of International Law, will have voted upon them in Pan American Conferences?

That is not, however, the only task that the Institute has given itself.

The geographical situation, the history and the political life of the states of the New World have presented special problems and brought forth conditions of their own.

In the solution of these problems and in the examination of these conditions, the general principles universally accepted must be applied, when possible. But, in default of such application, it will be proper to enlarge and even to develop these principles, following the concept of justice and keeping in mind the express or tacit desires of the American states.

This aspect of international law, which may be called American, in no way implies a desire on the part of the Institute to create a special law for its continent different from universal international law. In regulating the problems and conditions which interest the states of the New World, the new Institute will not be constructing a system of its own any more than the Pan-American Conferences have done so. The states of America believe that international law should keep its true physiognomy and

its universal character; but it is also their bounden duty to solve together international problems which are clearly American and which have thus far remained unsolved. We are happy to state that our eminent European colleagues, who have been kind enough to encourage us in our work, have expressed an opinion upon this point which is in conformity with our own.

In order to carry out its scientific aim, the Institute will aid in the work of codifying international law, which the American states have already proposed to undertake. It is a stupendous task, which will require a vast amount of preparatory work, accurate documentation, minute critical study and careful discrimination. But however arduous the task may be, it is not impossible. Moreover, a scientific institution is in a better position to accomplish this work than official assemblies.

* In certain American countries publications of a kind to facilitate such a task have appeared. Thus, in the United States there is the remarkable *Digest of International Law* of the learned Professor Moore. It is to be desired that all the states take the initiative in publishing similar works, of more modest proportions. To facilitate the publication of such works the Institute will issue diplomatic documents as well as the texts of laws, treaties, arbitral awards, etc., concerning the states of the New World, classifying them methodically.

The codification of international law is not sufficient in itself. Its interpretation and application must also be assured. This interpretation and application cannot be left to the free will or pleasure of a state. And, in this matter, the influence of the old system of civil law, which gave logical argumentation a preponderant rôle, must be avoided, and a practical mind brought to bear, which will render synonymous the expressions "law," "justice" and "equity." The necessity of assuring such application and such interpretation of international law did not, indeed, escape the sharp eyes of the diplomats who sat at The Hague. They voted, indeed, as an annex to the first *vœu* of the Second Peace Conference, a project having in view the organization of a Court of Arbitral Justice. And the first article of this project clearly indicates the character of the court; it should be "free and easy of access, composed of judges representing the various juridical systems of the world and capable of assuring the continuity of arbitral jurisprudence."

Finally, it will be the purpose of the Institute to form and direct fundamentally the public opinion of the American states by becoming, as much as possible, the organ of the juridical conscience of their continent. Without public opinion, there can be no true international law. International law will find its real support in public opinion rather than in force, for public opinion requires that the law which is established shall be applied everywhere. With this end in view, the by-laws of the new Institute provide for the establishment of national societies, which will be composed of an unlimited number of members. One such society has already been founded in Mexico, and several are in process of formation in other countries. It is our earnest hope that the charter members of the Institute in each state will direct all their efforts to create at once this indispensable organ.

III

In carrying on its activities according to the tendencies of modern international law and keeping in mind the necessities and aspirations of the American continent, the new Institute will not be the rival of the older institution, the Institute of Interna-

tional Law, but its collaborator. It will assist in preparing and facilitating the tasks of both the world conferences and the Pan American conferences. Its establishment is timely, for it meets a real necessity. This the European publicists well understood, since their authoritative word has sustained our efforts from the beginning. We include them all in the same grateful thought, because of the kindly interest which they have shown in our work.

Our gratitude must also go forth to our colleagues in America, the members of the Third Commission of the Conference of Rio de Janeiro, who deigned to honor us with a vote of approval by acclamation.

Finally, Mr. Elihu Root is specially entitled to our profound gratitude. As statesman and publicist, having ever at heart the promotion of peace and harmony among the states of the New World, the eminent jurisconsult has not hesitated to attach himself to our cause. He heartily commended our idea, he gave his support without reserve to our project; he has given us the most striking proof of his sympathy by accepting the honorary presidency of the American Institute of International Law. The authority of his name is for us the surest guarantee of success.

We have the honor to hand you herewith the constitution and by-laws of the new Institute, which have been approved by the great majority of the members. Such modifications as are deemed necessary will be made at a meeting which we hope will soon take place.

In conformity with the authority which the charter members have given us by approving the constitution, the following temporary organization has this day been effected:

Honorary President:	Mr. ELIHU ROOT
President:	Mr. JAMES BROWN SCOTT
Secretary General:	Mr. ALEJANDRO ALVAREZ
Treasurer:	Mr. LUIS ANDERSON.

We are, etc.,

JAMES BROWN SCOTT.
ALEJANDRO ALVAREZ.

THE THIRD ANNUAL MEETING OF JUDICIAL SETTLEMENT SOCIETY

The American Society for Judicial Settlement of International Disputes held its third annual meeting at Washington, December 20-21, 1912, under the presidency of His Excellency Simeon E. Baldwin, Governor of Connecticut. The society was founded in 1910, for the purpose of forwarding the establishment of a truly permanent international court.¹

The first annual meeting was devoted to a discussion of the importance of judicial settlement of international disputes, the various ways in

¹ For a statement of the aims and purposes of the society, see editorial comment in this JOURNAL for January, 1911, Vol. V, p. 193.

which a truly permanent court for the trial of such disputes might be created and installed at The Hague, and the services which the successful operation of such a court would render to nations in controversy over questions of a legal nature. At the second annual meeting, held at Cincinnati, November 7-8, 1911, the proposed treaties of arbitration between Great Britain and France, on the one hand, and the United States, on the other, were examined. The present meeting, the third in the series, devoted itself to the question of the law to be administered by such a tribunal.

At the Friday evening session Governor Baldwin spoke on "The International Court, a Natural Incident of the Evolution of the Modern World"; the Attorney General of the United States on the "Supreme Court of the United States a Prototype of a Court of Nations"; Mr. Everett P. Wheeler, of the New York bar, on "The Right to Arbitration under the Hague Convention"; Mr. Thomas Willing Balch, of the Philadelphia bar, on "The Advance of International Peace through Legal and Judicial Means"; Mr. Joseph E. Davies of the Madison (Wis.) bar, on "The American Judiciary and a World-Wide Reign of Law." At the Saturday morning session Professor Henry Wade Rogers, Dean of the Yale Law School, spoke on "The Essentials of Law to be Applied by an International Court"; Mr. Thomas Raeburn White, of the Philadelphia bar, on "The Immediate Establishment of an International Court of Arbitral Justice"; Mr. William Cullen Dennis, of the Washington bar, on "The Necessity for an International Code of Arbitral Procedure"; Professor Paul S. Reinsch, of the University of Wisconsin, on "The Idea of Responsibility for Wrongs as Applied in International Law." At the Saturday afternoon session Mr. William B. Hornblower, of the New York bar, discussed "How far are wars preventable by Judicial Arbitration?" Mr. Robert Lansing, of the Watertown (N. Y.) bar, "The Relation of International Law to Fundamental Rights"; Professor A. L. P. Dennis, of the University of Wisconsin, "The Change in the Nature of International Controversies"; and Mr. Omar F. Hershey, of the Baltimore bar, "The Line of Least Resistance in the Establishment of International Tribunals."

The proceedings ended with a banquet at the New Willard on Saturday evening, which the President of the United States had hoped to attend in person. His absence at Panama prevented this, but he showed his deep interest in the society and its aims and purposes by the following letter:

I am very sorry I cannot be present at the dinner of the Judicial Settlement Society on Saturday evening of this week. While I favored strongly the general arbitration treaties with Great Britain and France which were submitted by me to the Senate, my whole ideal is that of an arbitral court for the settlement of international controversies, and I favored the general arbitration treaties as a long step toward an arbitral court whose jurisdiction should be increased ultimately to include all possible disputes of an international character. Such a court is the natural outgrowth of treaties of general arbitration between all the nations of the world, and it represents the ultimate goal toward which we should be tending. With the hope that the meeting this year may be as successful as in the past, and may give an additional impetus to the cause, believe me,

Sincerely yours,
WM. H. TAFT.

The society has chosen to limit itself to a small portion of a large field, but in doing so it brings together distinguished lawyers and judges who see in the judicial settlement of international disputes the hope of international peace. The proceedings of the first annual meeting have, it is believed, crystallized sentiment in favor of a permanent international court and, printed in an attractive volume, they have been widely read not only at home but abroad, and have been much quoted by foreign publicists. The present addresses and discussions will, when published, be a further and not less valuable contribution to the general subject, for to operate successfully a court must have law, and the essentials of this law must be known and understood in advance.

The officers elected for the ensuing year are the Hon. Joseph H. Choate of New York, President; Dr. Charles W. Eliot of Cambridge, Mass., Vice President; Mr. James Brown Scott of Washington, D. C., Secretary; Mr. J. G. Schmidlapp of Cincinnati, Ohio, Treasurer.

SEVENTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The Seventh Annual Meeting of the American Society of International Law will be held, as usual, at Washington during the last week of April (April 24-26, 1913) ending with the customary dinner on the evening of the 26th. The Program Committee has decided to devote the sessions to two subjects: (1) The international use of straits and canals; (2) consideration and discussion of the report of the Committee on Codification. The latter subject has occupied the attention of the Society for the past three years, and it is believed that the committee will be in a position

to report very considerable progress as to the methods and principles of codification.

The subject is peculiarly timely, because it is exactly fifty years to the day since the first successful piece of codification of a branch of international law was undertaken and published; namely, *Instructions for the Government of Armies of the United States in the Field*, issued as General Orders No. 100 on April 24, 1863, and prepared by Francis Lieber, then professor at Columbia College. The president's address, which will be delivered on the evening of April 24, will deal with Dr. Lieber's services to international law and the importance of the instructions which, as is well known, served as the basis of the Declaration of Brussels and influenced profoundly the codification of the usages and customs of war on land adopted by the First Hague Peace Conference of 1899 and revised by the Second Conference of 1907. Mr. Root's address therefore will very properly commemorate the publication of the instructions which mark a date in the development of international law.

The first subject is no less timely, for the international use of straits and canals is a matter of the greatest moment not merely to theorists of international law, but to the business of the world. The opening of the Panama Canal would alone justify a theoretical and practical consideration of this topic, but the controversy concerning the conditions upon which vessels are to be permitted to use it makes a consideration of the whole question almost a matter of necessity. The committee in charge of the program is unwilling to have the Panama question discussed in a partisan spirit and dissociated from the broad question of the international use of straits and canals in general. The entire subject will be presented, not merely the problems concerning the Panama Canal. Care will be taken to have papers prepared by competent publicists dealing with what may be called the national as distinguished from the international aspects of the case, so that the proceedings will furnish a conspectus of scientific thought on the international use of connecting bodies of water, natural as well as artificial. It is hoped that the discussions of the members attending will be as interesting and valuable as the formal papers and that the proceedings will be a contribution to the subject.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Ann. Vie Int.*, Annuaire de la Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bollettino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain, Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil générale de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain, Treaty series.

March, 1912.

- 25 PANAMA — PERU. Convention for the exchange of postal packages without declared value, signed at Panama. *El Peruano*, September 11.

April, 1912.

- 24 CUBA — PERU. Treaty of friendship, commerce, and navigation signed at Lima. *B. Rel. Ext.* (Lima), 45:86-106.

June, 1912.

- 26-July 19. MEETING OF THE INTERNATIONAL COMMISSION OF AMERICAN JURISTS at Rio de Janeiro to prepare drafts of codes of public and private international law. *Mem. dipl.*, 50:466; this JOURNAL, 6:931-935; *Libro Rosado* (Salvador), August, 1912.

July, 1912.

- 4 BELGIUM — PORTUGAL. Ratification of the convention of January 18, 1912, relative to the establishment of telegraphic relations between the Belgian Congo and Angola. *B. Usuel*, July 4.

July, 1912.

- 21-28 THIRD INTERNATIONAL CONGRESS OF AMERICAN STUDENTS, met at Lima. *P. A. U.*, 35:477-497. Former meetings at Montevideo, 1908, and Buenos Aires, 1910; the fourth will be held at Santiago de Chile.
- 22-August 9. GREAT BRITAIN — PORTUGAL. Agreement by exchange of notes at Lisbon, respecting boundaries in East Africa, Barue section — from Mazoe River to Latitude 18° 30' S. *Treaty ser.*, No. 21, 1912.
- 29 ARGENTINE — URUGUAY. Protocol regarding the coasting trade signed at Montevideo. *D. O.* (Uruguay), September 14.

August, 1912.

- 6-12 SEVENTH INTERNATIONAL CONGRESS OF MEDICINE met in London. *La Vie Int.*, 1:133.
- 10 MEXICO — SALVADOR. Promulgation by President of Mexico of the treaty of extradition signed at Guatemala January 22, 1912. *P. A. U.*, 35:647.
- 11-18 INTERNATIONAL ESPERANTIST CONGRESS met at Cracow. *La Vie Int.*, 1:144.
- 16 FRANCE — RUSSIA. Naval convention signed at St. Petersburg, *Q. dipl.*, 34:310.
- 17 ARGENTINE — ITALY. Sanitary convention signed at Rome. *Q. dipl.*, 34:312.
- 20 COLOMBIA — GREAT BRITAIN. Protocol signed at Bogota respecting the application of the treaty of commerce of February 16, 1866, to certain parts of His British Majesty's dominions. *Treaty ser.*, No. 24, 1912.
- 21-28 INTERNATIONAL CONGRESS OF MATHEMATICIANS met at London. *Times*, August 24; *R. Scientifique*, October 12.
- 24-31 THE INSTITUTE OF INTERNATIONAL LAW met at Christiania. The Institute accepted the invitation of the Trustees of the Carnegie Endowment for International Peace to serve as General Adviser to the Division of International Law. This JOURNAL, 6:939; *American Political Science R.*, 6:598; *Times*, September 4. Next meeting, Oxford, 1913.
- 26 ARGENTINE — MEXICO. Convention signed at Buenos Aires for the transportation of diplomatic correspondence. *B. Rel. Ext.* (Buenos Aires), July, 1912.

August, 1912.

- 27 INTERNATIONAL GLACIER CONGRESS opened at Grenoble. *R. Scientifique*, September 7.
- 28-29 INTERNATIONAL DENTAL FEDERATION held its twelfth annual meeting at Stockholm. The next International Dental Congress will be in London, August, 1914. *Times*, August 31.
- 29 PORTUGAL — SPAIN. Exchange of notes regarding the industrial use of boundary rivers. *Ga. de Madrid*, September 17.

September, 1912.

- 4 PORTUGAL — SPAIN. Spain denounced by note treaty of commerce and navigation signed March 27, 1893. *Ga. de Madrid*, October 15.
- 6-13 EIGHTH INTERNATIONAL CONGRESS OF APPLIED CHEMISTRY met at Washington and New York. *L'Int. Sc.*, (74).
- 8-15 EUCHARISTIC CONGRESS met at Vienna. *Times*, September 11.
- 9 FOURTEENTH INTERNATIONAL CONGRESS OF ANTHROPOLOGY AND PREHISTORIC ARCHAEOLOGY met at Geneva. *Mém. dipl.*, 50:514.
- 9-13 INTERNATIONAL CONGRESS FOR THE HISTORY OF RELIGIONS met at Leiden. *Nation*, 95:304.
- 12 GREAT BRITAIN — SPAIN. Exchange of notes granting reciprocal recognition of tonnage certificates of merchant vessels. *Ga. de Madrid*, October 15.
- 16 HUNGARY — UNITED STATES. Ratifications exchanged at Washington of the copyright treaty signed at Budapest, January 30, 1912. *U. S. Treaty ser.*, No. 571.
- 17 FRANCE — GERMANY. Exchange at Berlin of ratifications of the agreement signed February 2, 1912, concerning the nationality of persons in the exchanged African territory. *Mém. dipl.*, 50:515.
- 18-20 SEVENTEENTH CONGRESS OF THE INTERPARLIAMENTARY UNION met at Geneva. The next session will be at The Hague. *Times*, September 19, 21.
- 19 INTERNATIONAL PRISON COMMISSION holds meeting in Paris to make preliminary arrangements for the Congress to be held in London in 1915. *Times*, September 11.
- 23-28 FIFTEENTH INTERNATIONAL CONGRESS OF HYGIENE AND DEMOGRAPHY met at Washington. *P. A. U.*, 35:476; *Independent*, 73:805; Mitchell, "A World's Congress on Hygiene." *American R. of Rs.*, 46:593-596; *American Economic R.*, 1:453.

September, 1912.

- 23-28 NINETEENTH INTERNATIONAL PEACE CONGRESS met at Geneva. *Times*, September 24.
- 24 First joint meeting of the German and English committees of the KING EDWARD VII BRITISH-GERMAN FOUNDATION held in London. *Times*, September 28.
- 24-28 FIFTH INTERNATIONAL CONGRESS OF CHAMBERS OF COMMERCE met at Boston. *Independent*, 73:802; *P. A. U.*, 35:469.
- 25 INTERNATIONAL PHARMACEUTIC FEDERATION met at The Hague. *R. Scientifique*, September 21.
- 28 FRANCE — GERMANY. Declarations signed at Paris regarding (1) French Equatorial Africa and the Cameroons; (2) Dahomey and Sudan and Togo. *Times*, September 30; *J. O.*, October 10. See conventions of July 23, 1897, and November 4, 1911.

October, 1912.

- 3-8 INTERNATIONAL CONGRESS ON RADIOLY AND ELECTROLOGY met at Prague. *R. Scientifique*, September 14.
- 4 INTERNATIONAL ENGINEERING AND MACHINERY EXHIBITION opened at London. *Times*, October 3.
- 8 BALKAN STATES — TURKEY. Montenegro declares war against Turkey. Russia and Austria address joint note to Bulgaria. October 13, identic note to Turkey and identic reply to Russo-Austrian note. October 17, Turkey declares war against Bulgaria and Servia, and Greece declares war against Turkey. *Times*, October 8 and later.
- 9-16 THIRD INTERNATIONAL ARCHAEOLOGICAL CONGRESS met at Rome. *Times*, October 10.
- 15 ITALY — TURKEY. Protocol of peace preliminaries signed at Ouchy. *American R. of Rs.*, 46:536; *Times*, October 16, 19, partial text. E. Capel Cure, "The Treaty of Lausanne." *National R.*, 60:576-590. See October 18, below.
- 15 INTERNATIONAL CONFERENCE ON TIME RECKONING opened at the Paris Observatory. *Science*, 36:626.
- 16 FOURTH INTERNATIONAL ART CONGRESS met at Rome. *Times*, October 17.
- 17-23 INTERNATIONAL CONGRESS OF COMPARATIVE PATHOLOGY met at Paris. *R. Scientifique*, October 5.

October, 1912.

- 18 ITALY—TURKEY. Treaty of peace signed at Lausanne. *Q. dipl.*, 34:570.
- 19-27 FIRST INTERNATIONAL CONGRESS OF ELECTROCULTURE met at Rheims. *R. Scientifique*, August 31.
- 21-24 INTERNATIONAL CONFERENCE ON THE WHITE SLAVE TRAFFIC opened at Brussels. *Times*, October 22.
- 26 INTERNATIONAL CONVENTION FOR THE REGULATION OF EXHIBITIONS signed at Berlin. *Times*, October 28. The conference met October 7.
- 26-31. GREAT BRITAIN—JAPAN. Exchange of notes at Tokyo for the reciprocal waiver of consular fees on certificates of origin relating to exports. *Treaty ser.*, No. 23, 1912.
- 26—November 10. FOURTH INTERNATIONAL EXPOSITION OF AERIAL LOCOMOTION was held at Paris. *R. Scientifique*, September 7.
- 27-30 THIRD INTERNATIONAL CONGRESS OF THE PERIODICAL PRESS met at Paris. *R. Scientifique*, August 24.
- 28 CHINA. Protest against the salt gabelle was signed at Peking by the eleven Powers, parties to the peace protocol, for presentation to the Chinese Government. *Times*, October 29.
- 28 FRANCE—ITALY. Declaration signed at Paris in reference to Morocco and Libya respectively. *Times*, October 29.
- 28 RUSSIA—TURKEY. The Hague Tribunal began consideration of the Russian claim for interest on deferred indemnity payments. *Times*, October 29. The sentence was rendered November 11.
- 30 BRAZIL—PERU. Mixed Boundary Commission under protocol signed at Rio de Janeiro April 30, 1912, began its labors. *President's Message* (Lima), July 28, 1912.
- 30 GERMANY—GREAT BRITAIN. A conference opened at London for the promotion of a better understanding between the two countries. *Times*, October 31.

ADHESIONS.

- Circulation of Automobiles, Paris, October 11, 1909.
Greece. *B. Usuel*, July 26.
The Geneva Convention (Red Cross), July 6, 1906.
Bulgaria. *B. Usuel*, June 15.
The Hague Convention, 1907.
Luxembourg, I, III-XI, XIII, XIV.

Portugal, I-VII, IX-XI, XIII, XIV.

Roumania, I-XI. All in *J. O.*, October 27.

Protection of Literary and Artistic Works, Berlin, November 13, 1908.

Great Britain, Denmark. *B. Usuel*, August 1.

Already ratified by Germany, Belgium, Spain, France, Haiti, Japan, Liberia, Luxembourg, Monaco, Norway, Portugal, Switzerland, and Tunis.

Circulation of Obscene Literature, Paris, May 4, 1910.

Ratifications: Spain, Germany, Austria-Hungary, Belgium, Denmark, United States, France, Great Britain, Italy, Netherlands, Portugal, Russia, and Switzerland.

Adhesions: Luxembourg, Norway, German Colonies, Zanzibar, Canada, South African Union, Newfoundland, New Zealand, and Australia. *Ga. de Madrid*, September 3.

Sugar Convention, Brussels, March 17, 1912.

Switzerland. *B. Usuel*, July 29.

Sweden. *B. Usuel*, August 2.

Peru. *B. Usuel*, August 31.

Great Britain will withdraw in September, 1913. *Times*, August 31.

Italy, ditto. *Q. dipl.*, 34:371.

White Slave Convention, Paris, May 4, 1910.

Spain, Austria-Hungary, France, Great Britain, Netherlands, Russia, and Germany. *Ga. de Madrid*, September 18.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

UNITED STATES¹

Copyright benefits extended to Tunis, Proclamation. October 4, 1912. 1 p. (No. 1219.) *State Department.*

Copyright convention between United States and Hungary; signed Budapest. January 30, 1912. 5 p. (Treaty series 571.) [English and Hungarian.] *State Department.*

Diplomatic service of the United States. Information regarding appointments and promotions in. 1912. 13 p. *State Department.*

Naturalization laws and regulations. October 1, 1912. 31 p. *Immigration and Naturalization Bureau.* Paper, 5c.

North Atlantic Coast Fisheries arbitration, Agreement between United States and Great Britain, adopting with certain modifications rules and method of procedure recommended in award of September 7, 1910; signed Washington, July 20, 1912. 7 p. (Treaty series 572.) *State Department.*

Panama Canal toll rates, Proclamation. November 13, 1912. 1 p. (No. 1225.) *State Department.*

Radio communication, Regulations governing. Ed. Sept. 28, 1912. 13 p. *Navigation Bureau.* Paper, 5c.

Titanic, Report of investigation by British Government into circumstances attending foundering of on April 15, 1912. August 20, 1912. 88 p. il. (S. doc. 933.) *Senate.*

GEO. A. FINCH.

¹ When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

RUSSIA VERSUS TURKEY¹

Award rendered November 11, 1912, by the Arbitral Tribunal constituted by virtue of the Arbitration Agreement signed at Constantinople between Russia and Turkey, July 22/August 4, 1910

By a *compromis* signed at Constantinople July 22/August 4, 1910, the Imperial Government of Russia and the Imperial Ottoman Government agreed to submit to an arbitral tribunal the final decision of the following questions:

I. Whether or not the Imperial Ottoman Government must pay the Russian claimants interest-damages by reason of the dates on which the said government made payment of the indemnities determined in pursuance of Article 5 of the Treaty of January 27/February 8, 1879, as well as of the Protocol of the same date?

II. In case the first question is decided in the affirmative, what would be the amount of these interest-damages?

The arbitral tribunal was composed of

His Excellency Monsieur Lardy, Doctor of Laws, member and former president of the Institute of International Law, Envoy Extraordinary and Minister Plenipotentiary of Switzerland at Paris, member of the Permanent Court of Arbitration, umpire;

His Excellency Baron Michael von Taube, Assistant Minister of Public Instruction of Russia, Councilor of State, Doctor of Laws, associate of the Institute of International Law, member of the Permanent Court of Arbitration;

Monsieur André Mandelstam, First Dragoman of the Imperial Embassy of Russia at Constantinople, Councilor of State, Doctor of International Law, associate of the Institute of International Law;

Herante Abro Bey, Licentiate in Law, Legal Counsellor of the Sublime Porte; and Ahmed Réchid Bey, Licentiate in Law, Legal Counsellor of the Sublime Porte;

¹ Translated from the French by George D. Gregory, of Washington, D. C.
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Monsieur Henri Fromageot, Doctor of Laws, associate of the Institute of International Law, advocate in the Court of Appeals of Paris, acted as agent of the Imperial Russian Government and was assisted by

Monsieur Francis Rey, Doctor of Laws, Secretary of the European Commission of the Danube, in the capacity of secretary;

Monsieur Edouard Clunet, advocate in the Court of Appeals of Paris, member and former president of the Institute of International Law, acted as agent of the Imperial Ottoman Government and was assisted by

Monsieur Ernest Roguin, Professor of Comparative Legislation in the University of Lausanne, member of the Institute of International Law, in the capacity of counsel to the Ottoman Government;

Monsieur André Hesse, Doctor of Laws, advocate in the Court of Appeals of Paris, in the capacity of counsel to the Ottoman Government;

Youssouf Kémâl Bey, Professor in the Faculty of Law of Constantinople, former deputy, Director of the Ottoman Commission of Juridical Studies; in the capacity of counsel to the Ottoman Government;

Monsieur C. Campinchi, advocate in the Court of Appeals of Paris, in the capacity of secretary to the agent of the Ottoman Government;

Baron Michiels van Verduynen, Secretary General of the International Bureau of the Permanent Court of Arbitration, acted as Secretary General, and

Jonkheer W. Röell, First Secretary of the International Bureau of the Court, attended to the secretariat.

After a first session at The Hague on February 15, 1911, to arrange certain questions of procedure, the cases and counter-cases were duly exchanged by the parties and communicated to the arbitrators, who declared respectively, as well as the agents of the parties, that they waived the right to ask for further information.

The arbitral tribunal met again at The Hague on October 28, 29, 30, 31, November 2, 5, and 6, 1912, and after having heard the oral arguments of the agents and counsel of the parties, made the following award:

PRELIMINARY QUESTION

In view of the preliminary request of the Imperial Ottoman Government that the claim of the Imperial Russian Government be declared inadmissible without examining the principal question, the tribunal, considering that the Imperial Ottoman Government bases this pre-

liminary request, in its written demands, upon the fact "that the direct creditors for the principal sums adjudged to them were the Russian subjects individually, benefiting by a stipulation made in their names, either in the preliminaries of peace signed at San Stefano February 19/March 3, 1878, or by Article 5 of the treaty of Constantinople of January 27/February 8, 1879, or by the protocol of the same date, and that their titles in this respect were established by the designative decisions of the commission *ad hoc* which met at the Russian Embassy at Constantinople, which decisions were communicated to the Sublime Porte;

"That, under these circumstances, the Imperial Russian Government should have proved the survival of the rights of each claimant and the identity of the persons entitled at the present time to avail themselves of these rights, especially since the transfer of certain of these rights has been reported to the Imperial Ottoman Government;

"That, even admitting that the Russian state was the only direct creditor as to the indemnities, the Imperial Russian Government should have, nevertheless, made such proof, inasmuch as the said government could not deny its duty to transmit to the claimants or their assigns the sums which it might obtain in the present suit as moratory interest-damages, the claimants appearing, upon this supposition, as beneficiaries of the stipulation made in their interest, if not as creditors.

"That, however, the Imperial Russian Government furnished no proof as to the identity of the claimants or of their assigns, or as to the survival of their claims." (Counter-Reply of Turkey, pp. 81 and 82.)

Considering that the Imperial Russian Government maintains, on the contrary, in its written demands

"That the debt specified in the treaty of 1879 is, none the less, a debt of state to state; that it could not be otherwise as to the responsibility resulting from the failure to pay the said debt; that consequently the Imperial Russian Government alone is qualified to receipt for it, and, for that reason, to receive the sums to be paid to the claimants; that, moreover, the Imperial Ottoman Government does not dispute the Russian Government's title of direct creditor of the Sublime Porte;

"That the Imperial Russian Government is acting by virtue of a right which it possesses in claiming the interest-damages on account of the non-fulfilment of an engagement made with it directly;

"That it fully proves its rights by establishing the non-fulfilment of this engagement, which, moreover, is not disputed, and by presenting its title, which is the treaty of 1879 * * *;

"That the Sublime Porte, provided with the receipt regularly delivered to it by the Imperial Russian Government, has no concern in the allotment of the sums distributed or to be distributed by the said government among its subjects entitled to indemnity; that this is a question of a domestic nature with which the Imperial Ottoman Government has nothing to do"; (Reply of Russia, pp. 49 and 50).

Considering that the origin of the claim goes back to a war, an international fact in the first degree; that the source of the indemnity is not only an international treaty but a treaty of peace and the agreements made with a view to the execution of this treaty of peace; that this treaty and these agreements were between Russia and Turkey, settling between themselves, state to state, as public and sovereign Powers, a question of international law; that the preliminaries of peace included in the indemnities "which His Majesty the Emperor of Russia claims that the Sublime Porte bound itself to pay to him" the ten million roubles allowed as damages and interest to Russian subjects who were victims of the war in Turkey; that this condition of debt from state to state has been confirmed by the fact that the claims were to be examined by a purely Russian commission; that the Imperial Russian Government has full authority in the matter of conferring, collecting and distributing the indemnities, in its capacity as sole creditor; that whether, in theory, Russia has acted by virtue of its right to protect its nationals or by some other right is a matter of little moment, since it is with the Imperial Russian Government alone that the Sublime Porte entered into or undertook the engagement the fulfilment of which is demanded;

Considering that the fulfilment of engagements is, between states, as between individuals, the surest commentary on the effectiveness of these engagements;

That, upon the attempt of the Ottoman financial department in 1885 to impose the proportional stamp-tax required from individuals by the Ottoman laws, upon a receipt given by the Russian Embassy at Constantinople for a payment on account, Russia immediately protested and maintained "that the debt was one contracted by the Ottoman to the Russian Government" * * * and "not a simple debt between individuals arising from a private engagement or contract" (Russian note of March 15/27, 1885, Russian Memorandum, Appendix No. 19, p. 19); that the Sublime Porte did not insist, and that in fact the two parties have constantly acted in practice, for more than fifteen years, as if Russia was the creditor of Turkey and not of private claimants;

That the Sublime Porte has made, without a single exception, all the successive payments upon the receipt alone of the Russian Embassy at Constantinople, acting in behalf of its government;

That the Sublime Porte has never asked, upon payments on account, if the beneficiaries were still living or who were their assigns at the time, or according to what method the payments on account were divided among them, leaving this duty entirely to the Imperial Russian Government;

Considering that the Sublime Porte contends, in the main, in the present litigation, that it is fully released by the payments which it has, in fact, made to the Imperial Russian Government alone represented by its Embassy, without the participation of the claimants;

For these reasons decides that

THE PRELIMINARY REQUEST IS SET ASIDE.

Passing then upon the main question, the arbitral tribunal renders the following decision:

I

IN THE MATTER OF FACT

The protocol signed at Adrianople January 19/31, 1878, which put an end by an armistice to hostilities between Russia and Turkey, contains the following stipulation:

5. The Sublime Porte engages to indemnify Russia for the cost of the war and the losses that it has been forced to suffer. The character of this indemnity, whether pecuniary, territorial or other, will be arranged later.

Article 19 of the preliminaries of peace signed at San Stefano February 19/March 3, 1878, is in these terms:

The war indemnities and the losses suffered by Russia which His Majesty the Emperor of Russia claims, and which the Sublime Porte has engaged to pay to him, consist of: (a) 900 million roubles, war expenses; (b) 400 million roubles, damages upon the southern coast; (c) 100 million roubles, damages in the Caucasus; (d) *ten million roubles, damages and interest to Russian subjects and institutions in Turkey:* total 1400 million roubles.

And further on:

The ten million roubles claimed as indemnity for Russian subjects and institutions in Turkey shall be paid as soon as the claims of those interested have been examined by the Russian Embassy at Constantinople and transmitted to the Sublime Porte.

At the Congress of Berlin, at the session of July 2, 1878, Protocol No. 11, it was agreed that the ten million roubles in question did not concern Europe but only the two interested states, and that they would not be mentioned in the treaty between the Powers represented at Berlin. Consequently the question was again taken up directly between Russia and Turkey, who stipulated, in the final treaty of peace signed at Constantinople January 27/February 8, 1879, as follows:

Art. 5. — The claims of Russian subjects and institutions in Turkey for indemnity on account of damages suffered during the war will be paid as soon as they are examined by the Russian Embassy at Constantinople and transmitted to the Sublime Porte. The total of these claims shall in no case exceed 26,750,000 francs. Claims may be presented to the Sublime Porte beginning one year from the date on which ratifications are exchanged, and no claims will be admitted which are presented after the expiration of two years from that date.

The same day, January 27/February 8, 1879, in the protocol to the treaty of peace, the Russian plenipotentiary, Prince Lobanow, declared that the sum of 26,750,000 francs specified in Article V

constitutes a maximum which the claims could probably never reach; he adds that a commission ad hoc will be formed at the Russian Embassy to examine scrupulously the claims which are presented to it, and that, according to the instructions of his government, an Ottoman delegate can take part in the examination of these claims.

Ratifications of the treaty of peace were exchanged at St. Petersburg February 9/21, 1879.

The commission established at the Russian Embassy and composed of three Russian officials immediately began its labors. The Ottoman commissioner generally abstained from taking part. The total losses of Russian subjects was fixed by the commission at 6,186,543 francs. This was communicated to the Sublime Porte between October 22/November 3, 1880, and January 29/February 10, 1881. The sum was not contested and the Russian Embassy made claim for the payment at the same time that it transmitted the final decisions of the commission.

On September 23, 1881, the embassy transmitted a "petition" of the lawyer Rossolato, "special attorney of several Russian subjects" who were to receive indemnities, which petition was addressed to the embassy and demanded that the Ottoman Government should come to an understanding with the embassy "within eight days from notification, as to the method of payment," declaring that the said Ottoman Government was "held now and henceforth responsible for all interest damages, especially the moratory interest."

By a convention signed at Constantinople May 2/14, 1882, the two governments agreed, Article 1, that the war indemnity, the amount of which was fixed at 802,500,000 francs by Article IV of the treaty of peace of 1879 after deducting the value of the territory ceded by Turkey, should bear no interest and should be paid in one hundred annual instalments of 350,000 Turkish pounds, approximately 8,000,000 francs.

On June 19/July 1, 1884, no sum having been paid for the claimants, the embassy "makes formal claim for full payment of the indemnities which were adjudged to Russian subjects * * *; it will be obliged, otherwise, to acknowledge their right to claim, in addition to the principal, interest proportional to the delay in the settlement of their claims."

On December 19, 1884, the Sublime Porte made a first payment on account, of 50,000 Turkish pounds, approximately 1,150,000 francs.

In 1885 the union of Bulgaria and Eastern Roumelia occurred, as well as the Serbo-Bulgarian war. Turkey made no further payment on account. A reminding note having been sent in January, 1886, without result, the embassy insisted, on February 15/27, 1887. It transmitted a "petition" sent to it by Russian claimants, in which they hold the Ottoman Government "responsible for this increase of damages caused them by the delay in the payment of their indemnities," and the embassy adds: "Further postponements will force the Imperial Government to make claim in behalf of its nationals for interest on account of the delays in settling their claims."

Reminding notes of July and December, 1887, being without effect, the embassy complained on January 26/February 7, 1888, that Turkey has paid various debts incurred subsequent to its obligations to Russian claimants. It recalled the fact that "the arrears amount to the sum of about 215,000 Turkish pounds, a single payment of 50,000 Turkish pounds having been made out of a total of 265,000 Turkish pounds awarded"; it therefore requested "urgently * * * that the sums due Russian subjects be immediately, and before every other payment, levied upon the amount paid by X * * *" (a debtor of the Imperial Ottoman Government).

On April 22, 1889, Turkey made a second payment on account, of 50,000 pounds.

On December 31, 1890/January 12, 1891, the embassy, stating that it has been paid only 100,000 pounds out of a total of 265,000, wrote to the Sublime Porte that the delay in the settlement of this debt is causing the Russian nationals to suffer losses that are continually increasing; it

believes, therefore, that it is its duty to request the Sublime Porte "to have immediate orders issued by the proper person so that the sum due may be paid without delay, *as well as the legal interest* in regard to which (the embassy) had the honor of notifying the Sublime Porte by its note of February 15/27, 1887."

In August, 1891, a further reminder was sent. In October/November, 1892, the embassy wrote "that matters cannot continue indefinitely in this way"; that "the requests of Russian subjects are becoming more and more urgent," that "it is the duty of the embassy to act energetically in their behalf, * * * that it is a question of an indisputable obligation and an international duty to be performed * * *", that "the Ottoman Government can no longer offer as excuse the precarious state of its finances," and concluded by demanding a "prompt and final settlement of the debt."

April 2/14, 1893, a third instalment of 75,000 Turkish pounds was paid; the Sublime Porte, in giving notice of this payment on March 27, adds that, as to the balance, half of it will be included in the current budget and the other half in the next budget; "the question thus settled happily ends the incidents to which it had given rise." The Porte hoped, therefore, that the embassy would be willing, because of its sincere friendly sentiments towards Turkey, to accept definitively the *tumbeki* monopoly, following the example of the other Powers.

On this occasion, and recalling the fact that the Imperial Russian Government "has always shown itself friendly and conciliating in all its business pertaining to the financial interests of the Ottoman Empire," the embassy acted on the 30th of the same month in accordance with the terms announced in view of the payment, and consented to subject Russians engaged in the *tumbeki* trade in Turkey to the newly created arrangement.

A year later, May 23/June 4, 1894, not having received another instalment, the ambassador, after having stated the non-performance of the "arrangement" to which he had "consented in order to facilitate the fulfilment of its obligation by the Ottoman Government," declared that he was "placed in a position which renders it impossible for him to accept further promises, arrangements or postponements," and, "obliged to insist that the total of the balance due to Russian subjects, which amounts to 91,000 Turkish pounds, be, without further delay, paid to the embassy. * * * Recent financial operations have just placed at the disposal (of the Sublime Porte) large sums."

On October 27 of the same year, 1894, an instalment of 50,000 Turkish pounds was paid, and the Sublime Porte wrote, as early as the third of the same month, to the embassy: "As to the balance of 41,000 Turkish pounds, the Ottoman Bank will guarantee payment in the near future."

In 1896, there was an exchange of correspondence between the Sublime Porte and the embassy as to whether the revenues upon which the Ottoman Bank was to levy the balance were not already pledged to Russia for payment of the war indemnity, properly so called, or whether that portion of the revenues over and above the annuity affected by the war indemnity could not be used to indemnify Russian subjects who were victims of the events of 1877-8. In the course of this correspondence, the Sublime Porte pointed out, in the notes which it addressed to the embassy on February 11 and May 28, 1896, that the balance due amounted to the sum of 43,978 Turkish pounds.

From 1895 to 1899, serious events occurring in Asia Minor obliged Turkey to seek an extension in behalf of the Ottoman Bank, at its request; the insurrection of the Druses, the insurrection in Crete which was followed by the Graeco-Turkish war of 1897, and insurrections in Macedonia, caused Turkey repeatedly to mobilize troops and even armies.

For three years no correspondence was exchanged and when it was resumed the Sublime Porte in notes it addressed to the embassy July 19, 1899, and July 5, 1900, again specified 43,978 Turkish pounds as the amount of the balance of the indemnities. On its part, the embassy, in its notes of April 25/May 8, 1900, and March 3/16, 1901, specified the same figure, but complained that the orders given in various provinces "for the payment of the 43,978 Turkish pounds, the amount of the balance of the indemnity due Russian subjects," have not been carried out, and that the Ottoman Bank has paid nothing; it urgently requests the Sublime Porte kindly to give categorical orders to the proper person for the payment, without further delay, of the above-mentioned sums."

After the Sublime Porte had announced in May, 1901, that the Department of Finance had been urged to settle the balance of the indemnity during the course of the month, the Ottoman Bank at last advised the Russian Embassy on February 24 and May 26, 1902, that it had received and was holding at the disposal of the embassy 42,438 Turkish pounds of the balance of 43,978 pounds.

The embassy in acknowledging receipt of this notice two months later, June 23/July 6, 1902, remarked to the Sublime Porte, "that the

Imperial Ottoman Government has taken more than twenty years to liquidate, and incompletely at that, a debt the immediate settlement of which was required from every point of view, a balance of 1,539 Turkish pounds still remaining unpaid. Referring, therefore, to its notes of September 23, 1881, February 15/27, 1887, and December 31, 1890/January 12, 1891, in regard to the interest to run on the said debt, remaining so long in suspense," the embassy transmitted a petition in which the claimants claim, in substance, compound interest at 12% from January 1, 1881, to March 15, 1887, and at 9% from the latter date, when the legal rate of interest was reduced by an Ottoman law. The sum claimed by the petitioners amounted in the spring of 1902 to some twenty million francs on an original principal of about 6,200,000 francs. The note concluded as follows:

The Imperial Embassy is pleased to believe that the Sublime Porte will not hesitate to admit in principle the just grounds for the claim set forth in this petition. In case, however, the Sublime Porte should raise objections to the amount of the sum claimed by the Russian subjects, the Imperial Embassy sees no reason why examination of the details should not be deferred to a commission composed of Russian and Ottoman delegates.

The Sublime Porte replied on the 17th of the same month, July, 1902, that Article V of the treaty of peace of 1879 and the protocol of the same date do not provide for interest, and that in the light of the diplomatic negotiations which have taken place on the subject, it was far from expecting that the claimants would make such demands at the last moment, the effect of which would be to reopen a question which was happily closed. The embassy replied on February 3/16, 1903, insisting "upon payment of the interest-damages claimed by its subjects. Only the amount of the damages could be a matter for investigation." In reply to a reminding note dated August 2/15, 1903, the Sublime Porte maintained its point of view, declaring itself, however, willing to submit the question to arbitration at The Hague, in case the claim should be insisted upon.

At the end of four years the embassy accepted this suggestion by a note of March 19—April 1, 1908.

The arbitration agreement was signed at Constantinople July 22/August 4, 1910.

As to the small sum of 1,539 Turkish pounds, it was, in December, 1902 placed by the Ottoman Bank at the disposal of the Russian Embassy, which refused it, and it remains deposited at the disposal of the embassy.

II

IN THE MATTER OF LAW

1. The Imperial Russian Government bases its demand upon "the responsibility of states for the non-payment of pecuniary debts"; this responsibility implies, according to it, "the obligation to pay interest-damages and especially interest on sums unduly withheld"; "the obligation to pay moratory interest" is "practical proof, in the matter of money debts," of the responsibility of states (Reply of Russia, pp. 27 and 51). "Failure to recognize these principles would be as contrary to the very conception of international law as it would be dangerous to the safety of peaceful relations; in fact, by declaring a debtor state irresponsible for the delay which it causes its creditor, it would be admitted by that very fact that it need only follow its own whim in making payments; * * * the creditor state, on the other hand, would be obliged to resort to violence against such a contention * * * and to expect nothing from a pretended international law incapable of compelling the promiser to keep his word." (Russian Case, p. 29.)

In other words, and still in the opinion of the Imperial Russian Government, "it is not a question of conventional interest, that is to say, interest arising from a particular stipulation * * *" but that "the obligation incumbent upon the Imperial Ottoman Government to pay moratory interest arises from the delay in the performance of the act, that is to say, the partial non-fulfilment of the stipulations of the treaty of peace; this obligation arose indeed, it is true, from the treaty of 1879, but it proceeds *ex post facto* from a new and accidental cause, namely, the failure of the Sublime Porte to carry out its contract as it had pledged itself to do." (Russian Case, p. 29; Russian Reply, pp. 22 and 27.)

2. The Imperial Ottoman Government, while admitting in explicit terms the general principle of the responsibility of states in the matter of the non-fulfilment of their engagements (Counter-Reply, p. 29, No. 286, note, and p. 52, No. 358), maintains, on the contrary, that in public international law moratory interest does not exist "unless expressly stipulated" (Ottoman Counter-Case, p. 31, No. 83, and p. 34, No. 95); that a state "is not a debtor like other debtors" (*ibid.*, p. 33, No. 90), and that, without attempting to maintain "that no principle which is observed between individuals can be applied between states" (Ottoman Counter-Reply, p. 26, No. 275), the position *sui generis* of the

state as a public Power must be taken into account; that various legislative acts (for example, the French law of 1831, which establishes a period of five years for the outlawing of state debts; the Roman law which lays down the principle "*Fiscus ex suis contractibus usuras non dat*," Lex 17, paragr. 5, *Digest* 22, 1) admit that the debtor state stands in a privileged position (Ottoman Counter-Reply, p. 33, No. 92); that in admitting against a state an implied obligation, not expressly stipulated, in extending, for example, to a debtor state the principles of a formal demand for payment and its effect in private law, this state would be made a "debtor to a greater extent than it would have desired, and there would be the risk of compromising the political life of the state, injuring its vital interests, upsetting its budget, preventing it from defending itself against an insurrection or foreign attack." (Ottoman Counter-Case, p. 33, No. 91.)

Contingently in case responsibility should attach to it, the Imperial Ottoman Government concludes that this responsibility consists solely in moratory interest, and that interest only from the date of the regular formal demand for payment. (Ottoman Counter-Reply, pp. 71 *et seq.*, Nos. 410, *et seq.*)

It presents in opposition, moreover, the exceptions of *res judicata*, of *force majeure*, of the gift character of the indemnities, and of the tacit or express renunciation by Russia of the benefit of the legal demand for payment.

3. The questions of law involved in the present litigation, which has arisen between states as public Powers subject to international law, and these questions being within the province of public law, the law to be applied is public international law, or the law of nations, and the parties rightly agree upon this point. (Russian Case, p. 32; Ottoman Counter-Case, Nos. 47 to 54, p. 18; Russian Reply, p. 18; Ottoman Counter-Reply, p. 17, Nos. 244 and 245.)

4. The demand of the Imperial Russian Government is based upon the general principle of the responsibility of states, in support of which it has cited a large number of arbitral awards.

The Sublime Porte, without disputing this general principle, contends that it is not subject to its application, but that states have the right to an exceptional and privileged position in the special case of responsibility in the matter of money debts.

It declares that the majority of the arbitral precedents cited are of no force, as they do not apply to this special category.

The Imperial Ottoman Government remarks, in support of its point of view, that in theory there is a distinction between various responsibilities, according to their origin and according to their scope. These shades of difference occur especially in the theory of responsibilities in the Roman law and in systems of law inspired by the Roman law. In the Ottoman Case attention is called to the following distinctions, some of which are classic: Responsibilities are, in the first place, divided into two categories, according as they arise from an act of violence or a quasi-act of violence, or from a contract. Among contractual responsibilities there is a further distinction, according as it is a question of obligations concerning a prestation of some kind other than a sum of money, or a question of prestations of a purely pecuniary nature, of a money debt properly so called. These various categories of responsibilities are not appreciated in civil law in absolutely the same manner, the circumstances giving rise to the responsibility as well as its consequences being variable. While in the matter of responsibilities arising from acts of violence no formality whatever is necessary, in the matter of contractual responsibilities a demand in due form of law is always required. While in the matter of obligations concerning a prestation other than one involving a sum of money, as likewise in the matter of acts of violence the reparation for the damage is complete (*lucrum cessans* and *damnum emergens*), this reparation, in the matter of money debts, is restricted legally to interest on the sum due, which interest runs only from the date of the demand in due form of law. The *interest-damages* are called *compensatory*, when they are compensation for damage resulting from an act of violence or the non-fulfilment of an obligation. They are *moratory interest-damages* when they are caused by delay in the fulfilment of an obligation. Finally, writers call *moratory interest* interest legally allowed in case of delay in the payment of money debts, thus distinguishing it from other interest which is sometimes added to the money valuation of damages, to fix the total amount of an indemnity, this last being called *compensatory interest*.

These distinctions in civil law can be explained: In the matter of contractual responsibility one has the right to require greater promptness on the part of the other contracting party than the victim of an unforeseen act of violence could expect. In the matter of money debts, the difficulty of estimating the consequences of the demand explains why the amount of the damages has been fixed legally.

The argument of the Imperial Ottoman Government consists in

maintaining that in public international law special responsibility, consisting in the payment of moratory interest in case of delay in the settlement of a money debt, does not exist so far as a debtor state is concerned. The Sublime Porte does not dispute the responsibility of states if it is a question of compensatory interest, or of interest that might enter into the calculation of these compensatory interest-damages. The responsibility which the Sublime Porte refuses to acknowledge is the interest which may result, in the form of interest for delay or moratory interest in the restricted sense, from delay in the fulfilment of a pecuniary obligation.

It is necessary to investigate whether these various terms, these appellations invented by commentators, correspond to intrinsic differences in the very nature of law, differences essentially juridical in the conception of responsibility. The tribunal is of the opinion that all interest-damages are always reparation, compensation for culpability. From this point of view all interest-damages are compensatory, whatever name they may be given. Legal interest allowed a creditor for a sum of money from the date of the demand in due form of law is the legal compensation for the delinquency of a tardy debtor exactly as interest-damages or interest allowed in case of an act of violence, of a quasi-act of violence or the non-fulfilment of an obligation are compensation for the injury suffered by the creditor, the money value of the responsibility of the delinquent debtor. Exaggeration of the consequences of civil-law distinctions in responsibility is the more inadmissible because in much recent legislation there appears a tendency to lessen or abolish the mitigation which the Roman law and its derivatives admitted in the matter of responsibility as to money debts. It is certain, indeed, that all culpability, whatever may be its origin, is finally valued in money and transformed into obligation to pay; it all ends, or can end, in the last analysis, in a money debt. The tribunal, therefore, cannot possibly perceive essential differences between various responsibilities. Identical in their origin — culpability — they are the same in their consequences — reparation in money.

The tribunal is, therefore, of the opinion that the general principle of the responsibility of states implies a special responsibility in the matter of delay in the payment of a money debt, unless the existence of a contrary international custom is proven.

The Imperial Russian Government and the Sublime Porte brought into their arguments a series of arbitral decisions, which have admitted,

affirmed and sanctioned the principle of the responsibility of states. The Sublime Porte considers nearly all of these decisions without any bearing on the present case, and eliminates even those in which the arbiter has expressly allowed interest on sums of money. The Imperial Ottoman Government is of the opinion that in these cases it is a question of compensatory interest and sets them aside as having no bearing on the present litigation. The tribunal, for the reasons indicated above, is of the opinion, on the contrary, that there is no reason why the great analogy which exists between the different forms of responsibility should not be taken into account; this analogy appears particularly close between interest called *moratory* and interest called *compensatory*. The analogy appears to be complete between the allowance of interest from a certain date upon valuing the responsibility in money, and the allowance of interest on the principal determined by agreement and remaining unpaid by a delinquent debtor. The only difference is that, in one case, the interest is allowed by the judge, since the debt was not exigible, and in the other case the amount of the debt was determined by agreement and the interest becomes exigible automatically in case of demand in due form of law.

To weaken this close analogy, the Sublime Porte must prove the existence of a custom, — of precedents in accordance with which moratory interest in the restricted sense of the word has been refused *because it was moratory interest*; or the existence of a custom derogatory, in the matter of a pecuniary debt, to the general principles of responsibility. The tribunal is of the opinion that such proof not only has not been given, but, on the contrary, the Imperial Russian Government has been able to reinforce its position by several arbitral awards in which moratory interest has been allowed to states, in some cases, it is true, with shades of difference, and to a certain extent debatable (*Mexico-Venezuela*, October 2, 1903, Russian Case, p. 28 and note 5, Ottoman Counter-Case, p. 38, No. 107; *Colombia-Italy*, April 9, 1904, Russian Reply, p. 28 and note 7, Ottoman Counter-Reply, p. 58, No. 368; *United States-Cherokees*, Russian Reply, p. 29, Ottoman Counter-Reply, p. 59, No. 369; *United States-Venezuela*, December 5, 1885, Russian Reply, p. 28 and note 5). To these cases should be added the award made on July 2, 1881, by His Majesty the Emperor of Austria in the Mosquitia affair, in the sense that the arbitrator in no wise refused moratory interest as such, but simply declared that the principal being in the nature of a gift, interest for deferred payment should not, in the judgment of the arbitrator,

be allowed (Russian Reply, p. 28, note 4; Ottoman Counter-Reply, p. 55, No. 365, note).

It remains to examine the question whether the Sublime Porte has any grounds for maintaining that a debtor state is not like other debtors, that it cannot be a "debtor to a greater extent than it may have wished," and that by binding it with obligations which it has not stipulated, for example the responsibilities of a private debtor, there is the risk of compromising its finances and even its political existence.

When the tribunal has admitted that no essential differences distinguish the various responsibilities of states from each other, that all are resolved or finally may be resolved into the payment of a sum of money, and that international custom and precedents accord with these principles, it must be concluded that the responsibility of states can be denied or admitted only in its entirety and not in part; thenceforth it would not be possible for the tribunal to declare this responsibility inapplicable in the matter of money debts without extending this inapplicability to all the other categories of responsibilities.

If a state is condemned to compensatory interest damages because of an act of violence or the non-fulfilment of an obligation, it is a debtor to a degree which it may not have voluntarily stipulated, even more so than in case of delay in the payment of a conventional money debt. As to the effects of these responsibilities upon the finances of a debtor state, they might indeed be just as serious, if not more so, if it were a question of interest damages which the Sublime Porte calls compensatory, as when it is simply a question of moratory interest in the restricted sense of the word. Moreover, however little the responsibility may imperil the existence of the state, it would constitute a case of *force majeure* which could be pleaded in public international law as well as by a private debtor.

The tribunal is, therefore, of the opinion that the Sublime Porte, who has explicitly accepted the principle of the responsibility of states, has no grounds for demanding an exception to this responsibility in the matter of money debts by pleading its character of public Power and the political and financial consequences of this responsibility.

5. To determine in what this special responsibility, which is incumbent upon a state debtor for a clear and exigible conventional debt, consists, it is now necessary to examine, proceeding by analogy as in the case of the arbitral awards which have been pleaded, the general principles of public and private law in this matter, as much from the point of view of the extent of this responsibility as of the contrary exceptions.

All the private legislation of the states forming the European concert admits, as did formerly the Roman law, the obligation to pay at least interest for delayed payments as legal indemnity when it is a question of the non-fulfilment of an obligation consisting in the payment of a sum of money fixed by convention, clear and exigible, such interest to be paid at least from the date of the demand made upon the debtor in due form of law. Some of this legislation goes farther and considers that such demand is already made upon the debtor on the date when the debt falls due, or admits complete reparation for damages instead of simple legal interest.

If most legislation, following the example of the Roman Law, requires an express demand in due form of law, it is because the creditor on his part is in default for lack of diligence inasmuch as he does not demand payment of a clear and exigible sum.

The Imperial Russian Government (Case, p. 32) itself admits, in favor of the necessity of a demand in due form of law, that, in equity, it may be expedient "not to take by surprise a debtor state liable to moratory interest, when no notice has been given to remind it to carry out its engagements." Writers (for example, Heffter, *International Law of Europe*, paragraph 94) remark that, in "the execution of a public treaty, we must proceed with moderation and equity, according to the maxim that we must treat others as we wish to be treated ourselves. We must, therefore, grant reasonable extensions, so that the obligated party may suffer the least possible injury. The obligated party may await the creditor's demand in due form of law before being held responsible for delay, provided it is not a question of prestations the performance of which is expressly stipulated for a fixed time." See also Mérignac, *Treatise on International Arbitration*, Paris, 1895, p. 290.

A number of international arbitral awards have admitted that, even when it is a question of interest-damages for deferred payments, there is no occasion to have it run from the date of the damageable fact (*United States v. Venezuela, Orinoco*, Hague award of October 25, 1910, protocols, p. 59; *United States v. Chile*, May 15, 1863, award of His Majesty the King of the Belgians Leopold I, Lafontaine, *Pasicrisie*, p. 36, column 2 and page 37, column 1; *Germany v. Venezuela*, Arrangement of May 7, 1903, Ralston & Doyle, *Venezuelan Arbitrations*, Washington, 1904, pp. 520 to 523; *United States v. Venezuela*, December 5, 1885, Moore, *Digest of International Arbitrations*, p. 3545 and p. 3567, Vol. 4, etc.).

Hence there is no occasion, and it would be contrary to equity, to

assume that a debtor state is subject to stricter responsibility than a private debtor in most European legislation. Equity requires, as its theory indicates and as the Imperial Russian Government itself admits, that there shall be notice, demand in due form of law addressed to the debtor, for a sum which does not bear interest. The same reasons require that the demand in due form of law shall mention expressly the interest, and combine to set aside responsibility for more than simple legal interest.

It is seen from the correspondence submitted, that the Imperial Russian Government has expressly and in absolutely categorical terms demanded payment from the Sublime Porte of the principal and "interest," by the note of its embassy at Constantinople, dated December 31, 1890/January 12, 1891. Diplomatic channels are the normal and regular means of communication between states in their relations governed by international law. This demand for payment is, therefore, regular and in due form.

The Imperial Ottoman Government must, consequently, be held responsible for the interest for delayed payments from the date of the receipt of this demand in due form of law.

The Imperial Ottoman Government pleads, in case responsibility is imposed upon it, various exceptions, the scope of which remains to be examined:

6. *The exception of force majeure*, cited as of the first importance, may be pleaded in opposition in public as well as in private international law. International law must adapt itself to political necessities. The Imperial Russian Government expressly admits (Russian Reply, p. 33 and note 2) that the obligation of a state to carry out treaties may give way "if the very existence of the state should be in danger, if the observance of the international duty is * * * 'self-destructive.'"

It is incontestable that the Sublime Porte proves, by means of the exception of *force majeure* (Ottoman Counter-Reply, p. 43, Nos. 119 to 128, Ottoman Counter-Reply, p. 64, Nos. 382 to 398 and p. 87) that Turkey was, from 1881 to 1902, in the midst of financial difficulties of the utmost seriousness, increased by domestic and foreign events (insurrections and wars) which forced it to make special application of a large part of its revenues, to undergo foreign control as to part of its finances, to grant even a *moratorium* to the Ottoman Bank, and, generally, it was placed in a position where it could meet its engagements only with delay and postponements, and even then at great sacrifice.

But it is asserted, on the other hand, that during this same period and especially following the creation of the Ottoman Bank, Turkey was able to obtain loans at favorable rates, redeem other loans, and, finally, pay off a large part of its public debt, estimated at 350,000,000 francs (Russian Reply, p. 37). It would clearly be exaggeration to admit that the payment (or the obtaining of a loan for the payment) of the comparatively small sum of about six million francs due the Russian claimants would imperil the existence of the Ottoman Empire or seriously compromise its internal or external situation. The exception of *force majeure* cannot, therefore, be admitted.

7. The Sublime Porte maintains then "that the acknowledgment of a principal debt to the Russian claimants constituted a *gift* agreed upon in their interest between the two governments" (Counter-Reply, No. 253, p. 19; No. 331, p. 44; No. 365, p. 55, and conclusions, p. 87). It remarks that the German civil code, paragraph 522, the Germanic common law, Austrian jurisprudence and the Roman law, pleaded on suppletory grounds (Law 16 *præmium*, *Digest* 22, 1) forbid the imposition of moratory interest in the case of a donation. It cites, especially, the arbitral award made on July 2, 1881, by His Majesty the Emperor of Austria in the Mosquitia affair between Great Britain and Nicaragua.

In this affair Great Britain had renounced by a treaty of 1860 its protectorate over Mosquitia, had given up the city of Grey Town (San Juan del Norte) and had recognized the sovereignty of Nicaragua over Mosquitia, stipulating that this republic should pay for ten years to the chief of the Mosquitians an annual sum of 5,000 dollars, to facilitate the establishment of self-government in his territories. It was not long before this annuity ceased to be paid. In the opinion of the arbitrator, the chief of the Mosquitians was receiving the benefit of a veritable gift, claimed in his behalf from Nicaragua by the British Government, which had made political sacrifices in giving up its protectorate and the port of Grey Town. In the opinion of the tribunal, the Russian claimants suffered damages,—were victims of acts of war. Turkey bound itself to reimburse the amount of these damages to all the Russian victims who might prove their injury to the satisfaction of the commission established at the Russian Embassy at Constantinople. The decisions of this commission were not contested and it is not incumbent upon the arbitral tribunal to examine into them again or to decide whether or not they were too liberal. If the indemnification by Turkey of the Russian victims of war operations was not compulsory in the common law of na-

tions, it is in nowise contrary to that law and can be considered as the transformation of a moral duty into a juridical obligation by a treaty of peace, under conditions analogous to a war indemnity properly so called. In all the thirty years' diplomatic correspondence over this affair, the Russian victims of war operations have always been considered by the two parties signatory to the agreements of 1878-1879 as claimants and not as donees. Finally, Turkey has obtained value received for its pretended gift by the fact that hostilities have ceased (Russian Reply, p. 50, paragraph 2). It is, therefore, not possible to admit the existence of an act of generosity, and still less of a gift, and it is consequently superfluous to inquire whether in public international law donors should receive the benefit of exemption from moratory interest, established for their benefit by certain private legislation.

8. The Sublime Porte pleads the exception of *res judicata*, supporting its position upon the fact that three claimants have asked the commission established at the Russian Embassy at Constantinople for interest to the time of complete payment, that the commission set aside their request, and that this negative action would certainly have intervened in the case of the other claimants who have not claimed such interest. (Ottoman Counter-Reply, p. 86.)

This exception cannot be admitted because, even granting that the Constantinople commission may be considered as a tribunal, the question now pending is whether interest damages are due, *a posteriori*, by reason of the dates on which the indemnities fixed from 1878-81 by the commission were paid. But that commission did not decide and could not have decided this question.

9. The Sublime Porte pleads, as a last exception, the fact "that it was understood, tacitly and indeed expressly, in the course of the eleven or twelve last years of diplomatic correspondence, that Russia did not claim interest or interest-damages of any kind which would have been a burden to the Ottoman Empire," and "that the Imperial Russian Government, when once the entire principal was placed at its disposal, could not validly bring up again in a one-sided manner the understanding agreed to by it" (Ottoman Counter-Reply, pp. 89-91).

The Imperial Ottoman Government remarks, and justly, that if Russia sent to Constantinople through diplomatic channels, on December 31, 1890/January 12, 1891, a regular demand for payment of the principal and interest, it follows, on the other hand, from the subsequent correspondence, that at the time of the payments on account, no interest

reservation appeared in the receipts given by the embassy, and the embassy never considered the sums received as interest. It also follows that the parties not only mapped out plans to bring about payment, but abstained from mentioning interest during a period of some ten years. It follows, above all, that the two governments interpreted in the same manner the term *balance of the indemnity*; that this term, used for the first time by the Ottoman Ministry of Foreign Affairs in its communication of March 27, 1893, frequently recurs thereafter; that the two governments have constantly meant by the word balance the portion of the principal remaining due on the date the notes were exchanged, which sets aside moratory interest; that the Russian Ambassador at Constantinople wrote on May 23/June 4, 1894: "I am obliged to insist that the total of the balance due Russian subjects, which amounts to 91,000 Turkish pounds, be, without further delay, paid to the embassy, in order to give satisfaction to the just complaints and claims of those interested * * * and thus really put an end—to use Your Excellency's expression — to the incidents to which it had given rise"; that this sum of 91,000 Turkish pounds was exactly the sum which was then due on the principal and that thus moratory interest was not considered; that on October 3rd of the same year, 1894, Turkey, about to make a payment on account, of 50,000 pounds, announced to the embassy, without meeting with any objections, that the Ottoman Bank "will guarantee payment of the balance of 41,000 Turkish pounds"; that on January 13/25, 1896, the embassy again used the same term, *balance of the indemnity*, in protesting against the handing over by Turkey to the Ottoman Bank assignments of revenues which were already pledged to the Imperial Russian Government for the payment of the war indemnity; that on February 11th of the same year, 1896, at the time of the discussion of the resources to be furnished to the Ottoman Bank, the Sublime Porte mentioned, in a note addressed to the embassy, "the 43,978 Turkish pounds, representing the balance of the indemnity"; that a few days later, February 10/22, the embassy replied, making use of the same words *balance of the indemnity*; and that on May 28th the Ottoman Ministry of Foreign Affairs mentioned once more "the sum of 43,978 Turkish pounds representing the said balance"; that the same was true of a note of the embassy dated April 25/May 8, 1900, although more than four years had elapsed between this communication and the communication of 1896, and that the question of interest should have been again called to attention in some way after so long an interval; that this

same expression, *balance of the indemnity*, appears in the note of the Sublime Porte of July 5, 1900; that, finally, on March 3/16, 1901, the Russian Embassy, after having stated that the Ottoman Bank had not supplied further funds "for the payment of the 43,978 Turkish pounds, the amount of the balance of the indemnity due to Russian subjects," asked that categorical orders be sent to the proper person "for the payment without further delay 'of the above mentioned sums'"; that this balance, or practically this amount, having been held by the Ottoman Bank at the disposal of the embassy, it was not until several months later, June 23/July 6, that the embassy transmitted to the Sublime Porte a request of "those interested," demanding payment of some twenty million francs for interest on account of delayed payments, expressing the hope that the Sublime Porte "will not hesitate to recognize in principle the just grounds for the claim," except "to refer the examination of the details to a" mixed Russo-Turkish "commission"; that in short, for eleven years and more, and up to a date after the payment of the balance of the principal, there had not only not been a question of interest between the two governments, but mention had been made again and again of only the balance of the principal.

When the tribunal recognized that, according to the general principles and custom of public international law, there was a similarity between the condition of a state and that of an individual, which are debtors for a clear and exigible conventional sum, it is equitable and juridical also to apply by analogy the principles of private law common to cases where the demand for payment must be considered as removed and the benefit to be derived therefrom as eliminated. In private law, the effects of demand for payment are eliminated when the creditor, after having made legal demand upon the debtor, grants one or more extensions for the payment of the principal obligation, without reserving the rights acquired by the legal demand (Toullier-Duvergier, *Droit français*, vol. III, p. 159, No. 256), or again, when "the creditor does not follow up the summons to the debtor," and "these rules apply to interest-damages and also to interest due for the non-fulfilment of an obligation * * * or for delay in its fulfilment" (Duranton, *Droit français*, X, p. 470; Aubry and Rau, *Droit Civil*, 1871, IV, p. 99; Berney, *De la demeure*, etc., Lausanne, 1886, p. 62; Windscheid, *Lehrbuch des Pandektenrechts*, 1879, p. 99; Demolombe X, p. 49; Larombière I art., 1139, No. 22, etc.).

In the relations between the Imperial Russian Government and the

Sublime Porte, Russia therefore renounced its right to interest, since its embassy repeatedly accepted without discussion or reservation and mentioned again and again in its own diplomatic correspondence the amount of the balance of the indemnity as identical with the amount of the balance of the principal. In other words, the correspondence of the last few years proves that the two parties interpreted, in fact, the acts of 1879 as implying that the payment of the balance of the principal and the payment of the balance to which the claimants had a right were identical, and this implied the relinquishment of the right to interest or moratory interest damages.

The Imperial Russian Government cannot, when the principal of the indemnity has been paid or placed at its disposal, validly reconsider one-sidedly an interpretation accepted and practised in its name by its embassy.

III

IN CONCLUSION

The arbitral tribunal, basing its conclusion upon the statements of law and fact which precede, is of the opinion

That in principle the Imperial Ottoman Government was liable to moratory indemnities to the Imperial Russian Government from December 31, 1890/January 12, 1891, the date of the receipt of the explicit and regular demand for payment,

But that, in fact, the benefit to the Imperial Russian Government of this legal demand having ceased as a result of the subsequent relinquishment by its embassy at Constantinople, the Imperial Ottoman Government is not held liable to pay interest-damages by reason of the dates on which the payment of the indemnities was made,

And, consequently,

DECIDES

That a negative reply is made to Question 1 of Article 3 of the *compromis*, thus stated: "Whether or not the Imperial Ottoman Government must pay the Russian claimants interest-damages by reason of the dates on which the said government made payment of the indemnities

determined in pursuance of Article 5 of the treaty of January 27/February 8, 1879, as well as of the protocol of the same date?"

Done at The Hague, in the building of the Permanent Court of Arbitration, November 11, 1912.

LARDY, *President.*

MICHELS VAN VERDUYNEN, *Secretary General.*

ROËLL, *Secretary.*

BOOK REVIEWS

L'Asile interne devant le Droit International. By Dr. C. M. Tobar y Borgoño. Paris: V. Giard & E. Brière. pp. 367.

The purpose of the author is primarily to develop the history of the right of asylum. To this end, he begins with the earliest cities of refuge and traces the political and religious idea involved in their existence down to the present, particularly devoting himself to the modern development illustrated in the reception by legations and consulates of those who flee from arrest for supposed political offenses. Although a South American, the design of the author is to attack from the standpoint of logic, as well as of precedent, the rightfulness of recourse to such asylum. His opening chapter indicates very well the underlying idea of the book. "International law," he says, "notwithstanding the inequality of countries, should apply to all alike, since it is the expression of reason and justice; so that were another rule adopted, international law would disappear, for it would become unjust and irrational. This is why we have undertaken to consider the right of asylum, which has disappeared in Europe, and which, however, some desire to preserve perpetually in Latin America, creating thus, between free and independent, and consequently equal, countries an impossible and unjust legal distinction. Diplomatic asylum, serving no purpose in international polities, and being, on the other hand, an institution which places certain countries in a juridical condition inferior to others, is absurd and unjust."

The author asks himself whether the abolition of the right of asylum is proper and feasible. His answer is in the affirmative, and he believes, evidently, that the abolition of the right of asylum would have a material effect in doing away with the revolutions which still continue to curse some of the countries of South America.

The work under consideration is a large storehouse of information relative to modern instances of resort to the right of asylum and of illustrations of the attitude of various nations with regard thereto. A student of the subject should, however, supplement this work by reference to Moore's *International Law Digest*, with which, apparently, the author is unacquainted, but which gives in detail the American position

on the subject. After all, although the general attitude of the American Government has been hostile to the right of asylum and in this respect in accord with the ideas of the author, nevertheless, American Secretaries of State, as well as the author himself, have recognized the fact that certain South and Central American countries appear to acknowledge its existence and allow their actions to be controlled thereby, and that considerations of humanity still justify a recognition of the right, however slim its foundation in abstract law.

JACKSON H. RALSTON.

The Betrayal. By Admiral Lord Charles Beresford, R. N., M. P. London: P. S. King & Son. pp. 279, 2s. 6d.

Lord Charles Beresford has had a brilliant career as a naval officer, and in his endeavors for the establishment of a Naval Intelligence Office and a War Staff has rendered great service to his country. His views upon naval matters should be received with respect and proper consideration, but when he comes to deal with matters considering international war rights and international law he can be recognized as an old time English naval officer of the school of the *force majeure*. He has not recognized the fact that times have changed, that England is now more of a neutral than a belligerent and that there are other naval Powers in existence that possess strong navies and are ready to be tenacious as to their commercial and neutral as well as belligerent rights.

It is not our purpose to discuss the views advanced and the criticism made as to the naval policy pure and simple of Great Britain, but when the author discusses the question of the Declaration of London he comes within the domain of the purposes of this JOURNAL, that of international law.

The discussion following the formation of the Declaration of London and the introduction of the proposed Naval Prize Law has served a good purpose in making known to the casual Englishman and, above all, to the casual English naval officer, that there was a thing called international law which existed outside of national wishes and the naval regulations. Dr. A. Pearce Higgins, of London, who has written the best work on the Hague Conferences and the Naval Conference of London published abroad, says that "the recent discussions on the Declaration of London and the Naval Prize Bill by drawing attention to the importance of International Law have, I think, gone a long way towards breaking down the hitherto prevailing idea that the law of nations is the concern of only a few specialists."

Concerning the composition of the London Naval Conference, Lord Charles is somewhat in error in his statement that the rules and regulations composing the Declaration of London "were drawn by Foreign Office clerks according to the suggestions of alien jurists." Out of the thirty-seven (37) delegates composing the conference, fifteen were naval officers, three of whom were chiefs of delegation. The British delegation contained two naval officers of high rank out of the five composing the delegation. Both of these officers had the rank of Rear Admiral and one was at the time Chief of the Office of Naval Intelligence, appointed to this position on account of those peculiar qualities which made Lord Charles Beresford himself so distinguished as the pioneer Chief of Naval Intelligence of the British Navy. The other naval officer, Sir Charles Ottley, had not only been a Chief of the Office of Naval Intelligence, but was at the time the Secretary of the Council for Imperial Defense, a position approaching that of Chief of the Imperial General Staff for war purposes. The reviewer can assure Lord Charles that these officers were far from being dummies in the conference. Their views were frequently given and commanded attention, and justly so on account of the merits of their arguments and statements. I seriously doubt whether anything was acceded to by the British delegation in opposition to their professional views.

But great as the weight of the English delegation was in this conference, it must be remembered that the conference was an *international* one and the other delegations had both voice and vote and could not be compelled to agree with what they did not think in accord with their national interests.

But allowing for all that is lacking, the Declaration of London stands out as a great instrument of great value and force, whether ratified or not by England. It has clarified the atmosphere as to the most important of neutral and belligerent rights and has become a foundation for naval codification of rules of war, making its advent of the highest value.

The impetuous nature of the author of the book under review is shown to an amusing extent in his statement regarding what may be called the "Deerhound" article in one of the Hague conventions of 1907, by which the victor in a naval contest assumes, if he wishes, the control over the sick, wounded and shipwrecked men of the defeated enemy. Certainly with us we have never conceded the right of a neutral vessel like the "Deerhound" to take away the unharmed commander, like Semmes

of the Alabama, and if Lord Charles were placed in the same circumstances with a defeated German Admiral, I am sure he would not use the extravagant language that the provisions of the convention treating of this matter were "despicable and wicked." C. H. STOCKTON.

The Japanese Nation. Its Land, Its People and Its Life. With special consideration to its relations with the United States. By Inazo Nitobe. New York: G. P. Putnam's Sons. pp. xii, 334. \$2.00.

Dr. Nitobe is one of Japan's greatest scholars, educators and statesmen. He is a graduate of Johns Hopkins University and has married an American wife. He has always been one of America's stanchest friends in Japan and from his early youth his ideal has ever been to be "a span across the Pacific." He is best known in this country and in Europe as the author of *Bushido*, a remarkable interpretation of the "soul of Japan" which has been translated into many languages and has had a profound influence on Western thought.

His present compact volume of 334 pages is based on a series of lectures delivered last year before six American universities,—Brown, Columbia, Johns Hopkins, Virginia, Illinois and Minnesota. These universities had united with the Japanese government in arranging a yearly exchange of lectures between the two countries by distinguished American and Japanese scholars and men of affairs. Dr. Nitobe inaugurated the movement last year in the United States. This year Dr. Hamilton W. Mabie of New York returns the visit by lecturing in Japan. The six American universities, however, have now relinquished their part in the exchange to the Carnegie Endowment for International Peace. The Endowment proposes that future Japanese lecturers shall broaden their visits so as to take in other universities than the original six.

Though Dr. Nitobe's stay in each American university was very brief, it will be a pleasure for his countrymen to remember that wherever he went he made a remarkably favorable impression. He addressed audiences aggregating over forty thousand men and women and came into direct contact with all sorts and conditions of people. On his return to Japan he will undoubtedly be considered an authority on the United States for the rest of his life and will be ever ready to educate the public opinion of his countrymen on America and things American.

The book under review, like *Bushido*, is written with a purity of style and wealth of allusion that is simply marvelous in a Japanese. In-

deed it is not stretching the truth to aver that Dr. Nitobe is one of the foremost of living writers of English. The volume is divided into twelve chapters, which cover moral, mental, physical, religious, educational, economic and historical Japan and her relations to the United States. Each chapter is sane, sound and suggestive, though written of course from the Japanese standpoint. On the whole it is the best popular interpretation and picture of Japan yet written and as such ought to have a wide influence in this country. It is an embassy of peace and good will from the East to the West.

HAMILTON HOLT.

Foreign Companies and other Corporations. By E. Hilton Young. Cambridge University Press: 1912. pp. xii, 332. \$4.00 net.

The author treats his subject under two headings, that of private international law (Part I) and that of English law (Part II). Upon closer examination we find that the entire book deals with problems of private international law; the first part, from the point of view of logical reasoning, and the second, from that of English legislation and jurisprudence.

This division lends itself admirably to a comparative study of the laws of the various countries upon the subject of the nationality and domicile of "juristic persons." The author uses the latter term as it is employed in the writings of Continental authorities, in order to denote all the forms of association recognized as entities in law. The various systems for determining nationality are discussed *seriatim*. Thus, Vareilles-Sommières would nationalize the entity in the state to which a majority of its members belong; Thaller, in the state in which a majority of its capital was first subscribed; Lyon-Caen and Renault, in the state where its principal business is being conducted. The author is opposed to all of these, as well as to the general English and American rule by which nationality is determined by the country or state of organization. Of course, "nationality" (and "domicile") are used here in a very special sense in order to indicate that the rights and duties of the entity and its members are controlled by a certain system of law. "Domesticity" would be more accurate.

The author favors the principle that juristic persons should be deemed domestic in the country in which the center of administrative business is situated. This view he fortifies with argument and example. Indeed, he is sufficiently logical, as well as sufficiently sincere, to carry the argu-

ment to the point where it becomes obvious that the principle will not serve as a general rule for corporations at all; at least not in a real world, wherein legislatures persist in enacting laws to regulate the life of creatures created according to their own laws, rather than recognize that creatures may also exist and do business locally, though born under a different legal régime. Mr. Young exclaims laconically: "A peg cast in a round mould cannot be fitted into a square hole." In other words, it is difficult to apply the law of the state of the center of administrative business when the entity has been conceived in a foreign state and breathes through organs created by a wholly different system of law. Yet, rather than surrender the principle evolved from all his mass of logic, the author remarks sadly, but stolidly, that though practical difficulties are in the way, they do not affect its validity.

But the author has not made the most of his own principle from the practical point of view. Nowhere do we find a suggestion that the nationality of corporations might well be referred to the center of administrative business, when nationality becomes important to determine the enemy character of goods captured in time of war. Perhaps he did not consider it within the purview of his subject; yet it is a matter of great importance to private rights. The London Naval Conference considered the propriety of determining enemy character "according as the company had its headquarters in a neutral or enemy country," which would seem to be equivalent to the author's rule. No decision was reached and no clause adopted in the Declaration. But the fact that the proposition received such strong support shows that the principle is practical whenever the constitution of the entity and its internal functioning are immaterial.

We have had much pleasure in reading the book and would like to believe that its method represents that of the new era in legal literature. A legal treatise need no longer be a voluminous and dry encyclopaedic résumé of authorities (often conflicting) taken from one system of jurisprudence, around which it is assumed the world must needs revolve. We venture to say that the reader will have a better understanding of the English law in the second part by reason of the flood of light from Continental sources shed upon the subject in the first part.

A. K. KUHN.

La Representation Diplomatique de la Suisse. By René de Weck. Paris: Fontemoing & Co. 1911. pp. vi, 140.

This work is not, and does not purport to be, a treatise dealing with the foreign relations of Switzerland with other Powers. Its main purpose appears to be to record the development of the diplomatic personnel of the republic from the small beginnings of the sixteenth and seventeenth centuries to its present state of efficiency; and in so doing the author discusses with clearness and ability questions of Swiss constitutional law, the consideration of which is essential to a comprehensive representation of the subject with which he deals.

The book is divided into two parts, the first of which commences with a short sketch of the foreign relations of the Cantons before 1798; the author then discusses the effect on Swiss representation of the Act of Mediation and the neutralization of Switzerland in 1815. He closes this portion of his work with a chapter devoted principally to those provisions of the constitutions of 1848 and 1874 which set out and define the powers vested in the Federal Council and the Assembly with regard to the establishment and maintenance of diplomatic posts and the appointment of diplomatic officers.

The second part is devoted to the consideration of the part played by Switzerland as a member of the family of nations, and of the present status of its foreign representation, but mainly to an interesting discussion of the author's interpretation of the constitutional provisions dealing with the general subject of his work. The book closes with a chapter on the juridical status of the personal obligations and some considerations as to the part to be played by Swiss diplomacy in the future.

The work is unpretentious, simple and comprehensive within the limit of the field which it is designed to cover, and throughout the author is careful not to permit his sense of patriotism to stand in the way of a sound and temperate criticism.

C. L. BOUVÉ.

The Development of Belligerent Occupation. By Jacob Elon Conner. Published in the Bulletin of the State University of Iowa. Studies in Sociology, Economics, Politics, and History. April 6, 1912.

This little work by Dr. Conner, lately United States Consul at Saigon, Cochin China, and Consul at St. Petersburg since 1909, covers 64 pages.

In his introduction he points out the different meanings attached to the term "Belligerent Occupation," and to like expressions, saying, "We

have heard much of the military occupation of Cuba, Porto Rico and the Philippines, by the United States, and of China by the united Powers. Yet each case represents a different phase of occupation," and, he says, "speaking precisely, only the last mentioned is a case in point throughout, such as is contemplated in our subject." He discriminates between "military occupation," as in Cuba after our treaty of peace with Spain, and "belligerent occupation," which he confines to "occupation during the conflict."

He gives some seven pages to primitive usage, quoting the practices of the Israelites, of Cyrus as recorded by Xenophon, of Philip of Macedon after Chaeronea, and of the ancients in general, showing that "the constant tendency in warfare is toward intensification; the fiercest possible treatment of the fighting machinery of the enemy, whether it be a weapon or a man, and side by side with this the exemption of the unarmed or inoffensive populace."

Mr. Conner devotes eight and a half pages to "Roman Law and Usage," pointing out that "it is evident that whatever restraints they [the Romans] placed upon their soldiers in regard to pillage must have been dictated by expediency and good discipline rather than by compassion for the enemy. Cicero's dictum that 'it is not contrary to the laws of nature to spoil the goods of him who it is lawful to kill' betrays the primitive concept of war which obtained in his time, in that so little compassion is found for an enemy in the mind of a naturally compassionate man." He shows that *jus postliminium*, which was well established by the time of Justinian, was the initial step toward the rules of belligerent occupation.

Nine and a half pages follow under the title "From Justinian to the Publicists." During this time he shows almost "an interregnum of international law" except for "the services rendered by the so-called Holy Roman Empire and the Roman Catholic Church," and "a relapse toward barbaric methods." But he shows that great commanders sometimes either from policy or humanity protected the conquered civil population, instancing Belisarius, Totila, the Saracens and among them Abu Beki, and most particularly, Alfred the Great. He says, to Henry V of England in 1419 belongs the unique distinction of "the first attempts at a manual of instruction for his army in the territory of the enemy," and this most important manual Mr. Conner extensively summarizes. He shows the practice of English armies was greatly humanized thereafter in contrast to that of the Continental armies.

Mr. Conner gives eleven and a half succeeding pages to "The Publicists," and among them especially to the development of the rules of belligerent occupation by the great and humane mind of Hugo Grotius. Dr. Conner deeply regrets "that none of the publicists seem to have known of the war ordinances of Henry V," but he infers their indirect softening influences nevertheless, and particularly on Gentilis, who was at Oxford in Queen Elizabeth's reign and who was often consulted and whose mild advice on international affairs was often accepted by that great sovereign.

Dr. Conner's remaining pages are divided between the headings "From Grotius to Vattel" and "From Vattel to the Present." He shows that the century following Grotius witnessed "the greatest degree of amelioration of military usage the world has ever known," supporting the assertion by various examples and citations. This reviewer would suggest that in the recent writings of the Hon. Andrew D. White this view has been most eloquently, learnedly and impressively sustained with especial reference to the effect of Grotius' *De Jure Belli et Pacis*, and that in a later edition Dr. Conner might well add a reference thereto.

Dr. Conner shows that the practice of the British in the case of occupations during the War of the Revolution was more humane than in the War of 1812, but attributes it to the fact that the Colonies were then still regarded by them as domestic territory.

As to our great Civil War he says, "It may be wondered at that" its usages on both sides "were less mild than those of any other civilized contest in which the United States has been engaged." He examines and classifies no less than eight causes for this, and points out that Dr. Lieber's manual for the Federal Armies, prepared at the request of President Lincoln, approved and published by the United States Government in 1863, ushers in a new period of development, that of codification, this being the parent of many such codes by nations and international congresses, now partially harmonized by the Hague Conferences. He shows how greatly this code humanized the laws of occupation and that its influence has been world-wide.

He says that the extraordinary occupation of Pekin by the allies in 1900 promised much and fulfilled little as to modern usage, since China was not regarded as within the pale of international law in such matters; that the expedition was punitive in purpose; that innocent Chinese suffered many indignities in person and property. However, he shows that several cases of violence in the American force were tried and the

offenders severely punished and "serious attempts at restraint were very generally adopted."

Dr. Conner in closing, discusses again the right of *postliminium*, showing that the right perishes with the treaty of peace, so far as it affects property, and he says "Whatever one might say of the treatment of private movable property, no one now would be willing to say with Halleck 'We think, therefore, that by the just rules of war, the conqueror has the same right to use or alienate the public domain of the conquered or displaced government as he has to use or alienate its movable property.'"

In this connection it would have been profitable if there had been added some citations of texts or decisions supporting Dr. Conner's views. Certain decisions arising under the German occupation of French territory in connection with the Franco-Prussian War seem especially in point.

See case of *Guerin*, Court of Appeals of Nancy, 1872 (Dalloz, 1872, II, p. 185); and *Mohrl and Haas v. Hatzfeld*, same court, 1872 (Dalloz, II, p. 229); and see note of both cases, Scott's *Cases on International Law*, p. 674.

Dr. Conner's thesis is a clear, thoughtful and succinct historical review of his subject which will be read with interest and profit. A lawyer sometimes, as has been indicated, feels the lack of full supporting citations which have been, perhaps purposely, limited by Dr. Conner in a publication meant to be historical rather than legal.

CHARLES NOBLE GREGORY.

Las reclamaciones extranjeras y el Arbitraje. By Eliseo Giberga. Special supplement to the February, 1912, number of *El Economista*. Habana: Imprenta Avisador Comercial. 1912. pp. 22.

A special supplement of the February number of *El Economista*, published in Havana, contains a most interesting article by Eliseo Giberga, entitled "Las Reclamaciones Extranjeras y el Arbitraje."

From the wording of the title, one would naturally expect the article to treat of the general subject of "Foreign Claims and Arbitration," but a careful reading of the same leads the reviewer to believe that the title is misleading and ought to have been stated as "The liability of Cuba to the Governments of England, Germany, and France for the payment of claims arising during the struggle for independence."

The writer states, as a premise, that the Cuban state was not born as

a consequence and in continuation of the extinction of the sovereignty of Spain over Cuba. Neither in the historical nor in the juridical order was it the successor of the Spanish state. Spain was sovereign of the Island up until the ratification of the Treaty of Paris, by which she renounced her sovereignty,—and not in favor of the Cuban people. Up until that date, April 11, 1899, there had not existed in Cuba, nor had there been recognized, any other sovereignty; and, moreover, although such a declaration was unnecessary, the Constitution, under which it was born, expressly made it, and the new state was recognized.

Article Second of the Constitution declared the subsistence of the Spanish state and of its sovereignty over Cuba, and, consequently, the non-existence of another state and another sovereignty up until the ratification of the Treaty of Paris, and recognized that it was that treaty, and no other fact, that produced the extinction of said sovereignty.

He concludes that other states which recognized Cuba on the re-establishment of the republic in 1902, cannot exempt themselves from the declaration of Article Second, because, by that recognition, they implicitly accepted all of the declarations of the Constitution which it established relative to international order.

It is added that there are certain acts of the revolution for which the Cuban state may incur responsibility in determined circumstances. He states that there is in the Constitution a provisional clause which, confirming, although it was unnecessary, the irresponsibility of the new state, on general principles by reason of facts that occurred before its birth, makes, nevertheless, an exception. That article states that "The Republic of Cuba does not recognize more debts and engagements than those legitimately contracted, in benefit of the revolution, by Chiefs of the Corps of the Liberating Army after February 24, 1895, and prior to September 19th, of that year, the date on which the Constitution of Jimaguayu was promulgated, and the debts and engagements that the Revolutionary Government had contracted subsequently, either itself, or by its legitimate representatives abroad;" and this rule follows said provisional clause, "The Congress will determine such debts and engagements, and will decide concerning the payment of those which were legitimate."

It results, therefore, that if Cuba were responsible for debts in which all the requisites demanded by the first provisional clause of the Constitution were present, she would only be responsible when the inter-

ested parties, having gone to Congress, that body should declare their legitimacy and decide upon their payment, without which the Cuban Government would not be able to do, constitutionally, either one or the other thing. For claims distinct from those which are founded on that clause, Cuba is not responsible, either on the ground of the successor of the Spanish state, or on the ground of the successor of the revolution, which did not constitute an international personality and which was not recognized as such; nor would the Cuban Government be able to acquiesce in the payment of those debts, because the constitutional clause, which is prohibitive of the recognition of all debts and engagements not specified, prohibits it.

The writer then states that in regard to the claims presented to Cuba for payment that are not founded on the first provisional clause of the Constitution, the government will not be able to submit them to an arbitral decision, for it can only submit claims which are within its competency, and that an international tribunal would not be able to pronounce and order a thing done which a party was not competent to do. Consequently, a government is not able to empower arbitrators to decide on a thing which has been demanded of it when it has not the competency to grant such power. If the Cuban Government is not able, constitutionally, to recognize the obligations, it would not be able to confer upon arbitrators jurisdiction to recognize them. If it is not able, constitutionally, to pay them, it would not be able to confer upon arbitrators jurisdiction to decree payment.

The writer indicates a lack of confidence in his argument when he states that if it should be necessary to submit the claims to arbitration, and, for that purpose, to reform the Constitution, the arbitral opinion would have to limit itself to deciding upon the responsibility or the irresponsibility of the Cuban state.

He then states that if this question should be decided against Cuba by an arbitral tribunal (although he thinks it absurd that such a thing could happen), then it would be necessary for the Cuban Government to examine the claims, inquiring into and analyzing the facts and the quantity of the same, for the purpose of deciding the amount due; and that when the government had formed a judgment as to the quantity of claims and has entered into communication with the claimant governments, there would again be a new arbitration, which would then discuss the legitimacy and the amount of the claims.

The reviewer has set forth, rather fully, this most interesting article,

because he felt that, by doing so, the reader might be able to grasp the line of argument of the author.

There are three legal questions discussed, which are of utmost interest, especially, to the claimant governments.

(1) When did Cuba become a state, and, as such, responsible for her acts? This question is capable of discussion along lines of political philosophy, as well as those which are purely legal. The writer states that the Revolutionary Constitution of Jimaguayu was voted on the 16th day of September, 1895, and promulgated September 19th, of the same year, and that it gave itself the name of "Constitution of the Provisional Government of Cuba." This, it would appear, was the beginning of the Cuban state. Certainly, it seems to the reviewer, that there was then a *de facto* state, which carried on war against Spain and was the means, possibly due to the war between Spain and the United States, of its later becoming a *de jure* state at the time of the surrender of the sovereignty by Spain in the treaty between it and the United States, and, as such, it would appear to be responsible for obligations incurred by reason of the struggle for statehood, said obligations being necessarily incident thereto. To contend otherwise would seem to be an attempt to free herself of responsibility for the very acts which assisted her in obtaining statehood. The argument advanced by the writer would not seem to have any more legal weight than an argument that Cuba could not be responsible nor be held responsible for claims that may arise to-day, because she is not a state *de jure* and sovereign on account of the Platt Amendment and the possible intervention of the United States.

(2) The claim that Cuba can limit its responsibility by an article in its Constitution cannot be supported by international precedent or equitable principles. One of her sister republics had a provision in its Constitution which provided that foreigners could not, under certain circumstances, make a claim against the government; but when the question was presented before an arbitral tribunal, the arbitrators did not hesitate to find against the clause.

(3) The author states that if it is necessary to reform the Constitution and arbitrate, the only question that the tribunal could have jurisdiction over is an abstract one — the responsibility or irresponsibility of the Cuban state. In case of a finding adverse to Cuba, then he says that Cuba would examine the claims, and, thereafter, there would have to be another arbitration to pass upon the legality and amount of the

claims. These suggestions, if carried out, would place upon the claimants the expense of practically three arbitrations:

- (a) On the question of the responsibility of the Cuban state, — to be decided by an arbitral tribunal.
- (b) On the question of the proof, — to be presented before the Cuban Government.
- (c) On the question of the legitimacy and the amount of the claims, — to be presented before an arbitral tribunal.

How much more practical and simple it would be, in case Cuba should consent to arbitrate, to submit to but one arbitral tribunal the two questions:

- (a) Is Cuba responsible?
- (b) And, if so, to what extent?

WALTER S. PENFIELD.

Das internationale Privat-und Zivilprozessrecht auf Grund der Haager Konventionen. By Dr. F. Meili and Dr. A. Mamelok. Zurich: Orell Füssli. 1911. pp. xvi, 427.

The greatest progress in the science of private international law, known since the days of Bartolus (1314–1357), has been made during the 19th century. With the rapidly increasing intercourse among nations, there was naturally awakened a deep interest in the study of this branch of the law. Much was accomplished during this time to place this subject upon a deeper and broader foundation, but, as far as practical results are concerned, no great advance was made in the harmonization of the rules actually governing in the various countries. In the end it became apparent that this object could be accomplished only by international agreement. Through the initiative of the Government of the Netherlands, conferences were held in 1893, 1894, 1900, and 1904, at The Hague, by the leading countries of Continental Europe, the results of which were:

- (1) Three conventions on marriage, divorce and separation, and guardianship, signed in 1902 by Austria, Belgium, France, Germany, Hungary, Italy, Luxemburg, Netherlands, Portugal, Roumania, Spain, Sweden, and Switzerland, and now in force in most of these states.
- (2) A convention concerning civil procedure, signed in 1896 and in effect since 1899 in Austria, Belgium, Denmark, France, Germany, Hungary, Italy, Luxemburg, Netherlands, Norway, Portugal, Roumania, Russia, Spain, Sweden, and Switzerland.

This convention, revised by the fourth conference, is now supplanted by a convention signed in 1905 and in effect in the above mentioned states, excepting Luxemburg, since 1909.

(3) A convention concerning the effect of marriage upon the rights and duties of married persons in their personal relations and upon their property, signed in 1905.

(4) A convention relating to interdiction and similar measures, signed in 1905.

(The last two conventions have been signed and approved by a number of states and will go into effect as soon as six of the contracting parties have deposited their ratifications at The Hague.)

(5) A draft of a convention concerning succession and wills.

(6) A draft relating to bankruptcy, which is to serve merely as a basis for conventions to be concluded between particular states.

The work of the Hague conferences has stimulated materially the interest already existing in the conflict of laws and has led to the publication of a considerable literature, which is indicated by Dr. Meili and Dr. Mamelok on pp. XIII to XVI of the present work. In some of these works the conventions are given high praise; in others they are subjected to severe criticism. The present work by Dr. Meili and Dr. Mamelok occupies a middle ground. It recognizes that the conventions are defective and it suggests the desirability of a revision in some particulars. But it does not condemn. Dr. Meili was a delegate to the convention and therefore able to appreciate the difficulties in the way of reaching theoretically sound results. No perfect work could be expected from a conference in which 13 or more states took part, many of whose delegates were under strict instructions and represented on many points radically different views. A compromise was the best to be accomplished. The fact that under these conditions any agreement whatever was reached makes these conventions, in the eyes of the authors, a great landmark in the history of the conflict of laws.

The authors' object in writing the present work is explained in the preface. It is to make the convention better understood in Switzerland. Switzerland adopted all of the above conventions except those appearing under (3) and (4), but those relating to guardianship and procedure met with considerable opposition. This opposition the authors attribute largely to an insufficient knowledge of the principles of the conflict of laws on the part of the persons charged with the application of the convention — a knowledge which the conventions presuppose — and to

the difficulty of understanding and interpreting the conventions themselves. In order to present as clear a picture as possible, the discussion is limited to a consideration of the four conventions ratified by Switzerland. By way of introduction, the authors call attention to some of the burning questions in the conflict of laws (such as nationality, and domicile, public policy, evasion of domestic law, and *renvoi*), and to the efforts made in behalf of the unification of the rules relating to this subject, which culminated in the Hague conferences. In the so-called General Part the authors set forth certain general principles common to the four conventions, *viz.*, the nature of the rules contained in the conventions, their interpretation, and the mode of giving effect to them in the contracting states. In the discussion of the particular conventions, the authors deal with the conditions upon which the application of the rules laid down in each convention depends, the leading differences in the rules of private international law existing in the states in which the convention is in force; and the principles governing each convention.

The authors have done well to eliminate from their discussion all detail and to confine themselves to a consideration of the broad principles underlying the conventions. They are to be congratulated upon having succeeded in presenting to us an interesting and illuminating work upon a most complicated topic. It is an excellent general treatise on the Hague conventions relating to marriage, divorce and separation, guardianship, and civil procedure, and may be especially recommended to all who seek to make their first acquaintance with these conventions.

The text of the Hague conventions is printed at the end of the work in the original (French) and in a German translation.

E. G. LORENZEN.

Le Droit International Privé d'après les Conventions de la Haye. By G. C. Buzzati. Vol. I, *Le Mariage d'après la Convention du 12 Juin, 1902.* French translation of the Italian text, which was revised and corrected by the author, by Francis Rey. Paris: Larose & Tenin. 1911. pp. xvii, 507. 12 fr.

This is the first volume of an extensive treatise, in translated form, which Professor Buzzati, of the University of Pavia, plans to write on the Hague conventions. The original in Italian appeared in 1907. The translation was undertaken at the instance of the *Revue de Droit International Privé*, which, with the object of widening as far as possible the horizon of the French jurists in this important branch of juridical

science, proposes to cause the translation of the leading foreign works into French. Professor Buzzati has the honor of having his work on the Hague conventions chosen as the first one in the series. The conventions of The Hague constitute so far the last chapter in the history of private international law, and thus it appeared appropriate to begin the series with the most important work on these conventions.

Professor Buzzati needs no introduction to the world of legal scholars, as he is well known by his writings on international law and private international law, by his distinguished and successful efforts before the Institute of International Law against the sanction of *renvoi* in the conflict of laws and his work as delegate to the fourth conference at The Hague.

The present volume deals with the first of the six conventions agreed upon by the conferences at The Hague, *viz.*, the Law of Marriage, contained in the convention of June 12, 1902. By way of introduction, the author details the efforts made to bring about uniformity in the conflict of laws by international agreement, and shows the history of the four conferences of The Hague, and the results obtained. In the first chapter he deals with matrimonial capacity; in the second chapter with the public policy at the place of celebration; in the third chapter with the proof of capacity; in the fourth, with the form of marriage; in the fifth, with diplomatic and consular marriages; in the sixth, with the application of the conventions. There follow eight appendices which give in the original the conventions relating to marriage, divorce and separation, guardianship, procedure, the effect of marriage, and interdiction, and certain laws and decrees of various countries concerning the convention relating to Marriage.

Professor Buzzati explains in his preface to the French edition that the present volume is rather a new edition than a mere translation of the original edition in Italian. The author felt that, owing to the many decisions that had been rendered with regard to this convention since the appearance of the Italian edition, the extensive literature that had since grown up with respect to the convention and the passage of new laws concerning marriage by the states concerned, it was desirable to bring the book up to date. A few changes have also been made where the views first expressed seemed to require some modification or correction.

The work is preceded by an introduction by Professor A. de Laprade, of the *École de Droit* and editor of the *Revue de Droit International*.

Privé, in which he indicates the purpose of the series of which the present work is the first and briefly reviews the merits of this work. The estimate is so just and is so well expressed that it may be permitted to adopt a portion of the same. Professor de Lapradelle says:

What constitutes, among so many merits, the distinctive value of this book is that its author is neither an insider in relation to the conferences of The Hague, who would too naturally be inclined to praise, nor an outsider, too naturally inclined to criticize, but a spectator, who, by reason of his having observed the conferences both from within and without, has considered all the perspectives and grasped all the points of view. As far from being a critic from prejudice as from being an admirer by complaisance, he judges the conferences perfectly free in so manifestly independent a manner as to give to the reader a profound assurance that he possesses a judgment which no doubt may err but which is none the less impartial. Notwithstanding his profound admiration for the work and his respect for the distinguished participants therein, Professor Buzzati does not belong to those who prudently throw a veil on the imperfections which they have detected; he does not hold back what he ought to say. On the other hand, he is not whimsical to find everywhere only insufficiencies and faults. Using criticism or praise, in perfect independence, he goes from one to the other with a wise and sympathetic frankness. * * *

Especially he does not belong to those people attached to system who sacrifice everything for ideas. With a sense fully cognizant of the realities, he goes from principles to facts. Not content with describing in regard to marriage the mechanism of the convention, he sets it into action and examines its mainsprings. A minute study of foreign legislation enables him to do so. Armed in this way with all the resources of science, he knows thereupon with an extreme fertility of invention how to put questions and to imagine problems. By multiplying the hypotheses he demands of the rules of the conventions how they would operate in each case. Formulas and principles, rules and their interpretation, he tests all in turn by a series of problems which his vast erudition places at the service of a fine scientific imagination. If they withstand this complex and difficult test they may be considered as correct.

After such words of praise from such a source, any attempt to find fault with the work would be both presumptuous and futile. The writers on the convention have reached various conclusions in regard to the interpretation of the rules laid down therein, and issue may fairly be taken with Professor Buzzati in some particulars with reference to the position taken by him. But in view of the fact that the United States had not participated in these conferences nor is likely to adhere to the convention in the near future, a consideration of these differences of opinion may be properly postponed. Whatever the conclusion reached by Professor Buzzati, the steps by which it is reached are clearly shown. All the evidence to be found in the records of the conferences is most skillfully marshalled together and the deductions made therefrom

logically and clearly. On important points the leading views to the contrary are indicated in the text and are either explained or combatted. A single example may serve to show the profound and thorough scholarship of the author, viz., the discussion of the *renvoi* or reference provision of Article 1 of the convention, which reads as follows: "The right of contracting marriage shall be governed by the national law of each of the parties intending to marry, unless a provision of such law refers expressly to some other law." With regard to the doctrine of *renvoi*, as with all other questions, Professor Buzzati goes first through the records of the conferences to gather all the material that may throw light upon the purpose and meaning of the provision in question. He then examines the reasons advanced in support of the doctrine and shows their unsoundness. After that he illustrates the application of this provision and concludes that, barring Switzerland, in deference to whose law the reference provision was adopted, the national law means actually the territorial law of the contracting states and not their law inclusive of their rules of private international law. To illustrate: A, a German, marries B, an Italian, in Italy. The capacity of each will be governed by his, respectively her, national law in the territorial sense. Suppose, on the other hand, that A is a Swiss subject who marries B, an Italian, in Italy. Under the law of Switzerland the marriage will be valid if it satisfies the national law of each of the parties. Therefore, if A has capacity according to the Swiss federal law of marriage and B according to the Italian code, the marriage is valid. But suppose that A has no capacity under the Swiss federal law of marriage. Since the Swiss law, by an express provision, sanctions a marriage celebrated according to the *lex loci*, the marriage will nevertheless be valid if A possesses the necessary capacity under the Italian code.

But the author does not stop here in his study of the question of *renvoi*. May not the law of a non-contracting state, he inquires, become applicable under the convention? Article 8 reads:

The present convention applies only to marriages celebrated within the territory of the contracting Powers between persons of whom one at least is a subject of one of such Powers.

None of the Powers obligates itself by the present convention to apply a law which is not that of one of the contracting Powers.

Does the last provision of Article 8 mean that the convention gives to the contracting Powers the option of applying the law of a non-

contracting state? Meili seems to give an affirmative answer to the question (pp. 76-77 of the work reviewed above). Buzzati conceives its real meaning to be different. According to him, the convention does not oblige the contracting states to apply the law of a non-contracting state; hence it will not become applicable unless a particular state has adopted an express rule to that effect. An examination of the legislation of the contracting states in this regard leads Professor Buzzati to the conclusion that in none of the contracting states, save in Sweden in particular instances, does the convention actually apply where one of the parties to the marriage is a subject of a non-contracting state. The ordinary rules of private international law prevailing in the state will therefore govern the validity of such a marriage.

But suppose a state should change its view, as it may, and apply the convention to marriages where one of the parties is a subject of a non-contracting state. Our author contemplates this possibility even and points to the consequences which would result from the reference provision of Article 1. As far as the United States is concerned he reaches the following result:

(1) Suppose a statute of State X (in the United States) provides that a marriage celebrated outside of the State shall be valid if celebrated in accordance with the *lex loci* and that A, a citizen of State X, marries B, a German, in Germany.

Since there is an express reference in the law of X to the *lex loci*, A's capacity would be determined by the German civil code.

(2) Suppose a statute of State X provides that a marriage of persons domiciled in State X shall be valid if valid under the *lex loci*, and that A, who is domiciled in State X, marries B, a German, in Germany. A's capacity would be governed by the German civil code, because of the express reference provision in the law of State X.

(3) Suppose that in the preceding case A were domiciled in State Y. In this event A's capacity would be governed by the territorial law of State X, as the law of X contains an express reference only as to persons domiciled in State X. Article 1 of the convention is therefore not satisfied.

(4) Suppose a statute of State X provides that if a person domiciled in State X goes into another State for the purpose of evading the law of State X, and thereupon returns to live in State X, such marriage shall be void. Even here, according to Professor Buzzati, there is no express reference to another law, even though by way of analogy the marriage

would be regarded as valid, if there was no intention to evade the law of X. Hence the territorial law of State X would govern A's capacity.

(5) Suppose a statute of State X provides that a marriage celebrated without the State shall be valid if in accordance with the *lex loci et domicilii*. If A is domiciled in Germany and marries there, there would be an express reference, so that the German civil code would govern. If A was not domiciled in Germany but got married there, or, being domiciled in Germany, he got married elsewhere, so that one of the two conditions upon which the reference depends is absent, the territorial law of X would control, the law of X having no other statutory provision on the conflict of laws.

According to Professor Buzzati, therefore, an *express* reference means a *legislative* or *statutory* reference. If the same rule should be found not in a legislative enactment but in a common-law provision relating to the conflict of laws, it cannot be regarded as an express reference within the meaning of Article 1.

The same constructive scholarship is brought to bear upon all the problems raised by the convention. Nothing is omitted which is of consequence in understanding the meaning of the convention and its operation within the contracting states. He considers in detail not only the history of each provision of the convention and the rules and regulations adopted by each state in connection with the ratification of this convention, but also the rules of private international law of each of the contracting states. Not content with that, in order to be able to show the actual operation of the rules of the convention in the contracting states, he points out the differences in the municipal legislation of these states relative to each question under consideration. If one considers that the labor involved a study of the legislation of 13 different states (Austria, Belgium, France, Germany, Hungary, Italy, Luxemburg, Netherlands, Portugal, Roumania, Spain, Sweden, and Switzerland), one marvels indeed at the boldness of the undertaking. And as far as the execution of the plan is concerned, one marvels still more at the skill and depth of scholarship which enables an author like Professor Buzzati to use such a vast material effectively for the end which he has in view. The first volume of this remarkable work is indeed a work of great merit and we shall look forward with extreme interest to the publication of the other volumes.

E. G. LORENZEN.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

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KATHRYN SELLERS.

EXEMPTION FROM PANAMA TOLLS

A DISCUSSION BASED UPON THE LAW OF PUBLIC CALLINGS¹

"A trust for mankind" is what President Cleveland in a message termed such an enterprise as the Panama Canal. The question just now is whether such a trust is administered properly by giving to vessels engaged in the coasting trade of the United States a total exemption from tolls. It should be noticed that the question is not whether exemption may be given to war ships and other ships of the government, but whether it may be given to the ships of private owners. It should be noticed also that the question is not whether there may be a subsidy,—in other words, not whether the tolls of such vessels may properly be paid out of the national treasury — in which case the burden would be borne by all residents of the United States through the internal revenue, the tariff, and other taxes, and the benefit would be enjoyed initially by the treasury of the Panama Canal and eventually by all persons whom the canal may serve. No, the question is whether, in the words of the Panama Canal Act of 1912, "no tolls shall be levied upon vessels engaged in the coastwise trade of the United States," — with the almost inevitable result that the tolls exacted from other vessels will thus be made heavier than they otherwise would be.

This question is to some extent dependent upon treaty; but as a basis for understanding the whole matter it is essential to remember that a treaty is made in the light of existent national and international law, practice, and discussion. Hence the treaty itself may well be laid aside until after the presentation of other points.

THE LAW OF ENGLAND AND AMERICA AS TO PUBLIC CALLINGS

Let us begin at the beginning.

When a person builds a private railway on his own land he has a

¹ This is a revision of an article which appeared, under other titles, in the *Boston Evening Transcript* of February 8, 1913, and in the *Congressional Record* of February 26, 1913, p. 4223.

right to exclude all persons from using it and to exact any compensation he may see fit from any person to whom he may from time to time grant the occasional use of this private railway. Yet as soon as he holds out his railway as ready to serve the public he finds that the law now places upon him a new series of duties. This may be a surprise to the owner, for, naturally enough, he thinks that as long as he does not so use his property as to injure other persons he may use it as he pleases, continuing to exclude some persons from the advantages of the property and granting to other persons those advantages on any terms he may choose, whether those terms are identical or are discriminatory, and whether they give him an enormous compensation or not. His natural belief as to this matter is wholly in conflict with American and English law. From the time when he holds out his railway as a means of serving the public he is held by the courts to have entered upon a public calling, and he is thereafter compelled by the courts to perform some peculiar duties, of which it is enough for the present purpose to specify three — the duty of serving all comers, the duty of rendering identical services on identical terms, and the duty of charging only a reasonable rate.

It is not necessary to give in full the reasons upon which these rules of law are founded; but those to whom rules come as a surprise may very properly wish that the reasoning be not wholly omitted. Briefly, then, one of the reasons is found in the importance to the public of such service as this, and another is found in that discouragement of building other railways which arises from the building of this one. In other words, the public needs the service of a railway, and danger of competition from this one tends to prevent the building of another; and hence, unless this one can be compelled to give its chosen service fairly, the public will really suffer an injury.

The burdens, it should be repeated, are not cast upon this owner without his consent. If he had chosen, he might have carried on his railway wholly for himself, unless and until it should be taken from him by right of eminent domain; but by announcing his railway as open for the public he has assumed a new and peculiar position to which the law attaches special duties, and among others those enumerated duties of serving all, of serving without discrimination, and of serving at reasonable rates.

This is the important doctrine upon which, in the United States,

rests a great part of the power of those State and national commissions which deal with railways and other public callings. It is indeed one of the most important of the doctrines by which public welfare is secured without departure into socialism.

The peculiar duties attaching to those entering upon a public calling belong not only to individuals but also to incorporated companies — and to incorporated companies more clearly than to individuals because the incorporated company owes its very existence to that public which incorporated it. Besides, the incorporated company engaged in a public calling sometimes receives and uses that right of taking private property which is termed eminent domain; and, as the right of eminent domain cannot be exercised save by a government or under a grant given by a government, and whenever exercised must be used for public purposes, the mere exercise of the power of eminent domain carries with it the assumption of the duties of public service as to the property thus acquired.

Again, if a railway for public use is built by a city or other municipal corporation, this municipal corporation incurs the same duties — and still more clearly, for the municipal corporation is created by the State as an instrumentality for nothing but the public service.

Further, and still more clearly, as each of the United States is created by the people for public service exclusively, a State's railway, unless, indeed, used exclusively by the State government itself or by county or municipal governments, must be subject, as a matter of principle, to precisely similar duties. It is true that a State government, as distinguished from its officers, cannot be sued without the State's consent, and that hence a State may enjoy practical immunity from suit; but the absence of a remedy cannot blind anyone to the fact that a State owes duties; and the duties which the State imposes in behalf of the public against individuals and incorporated companies and municipalities cannot honorably be said by a State to be non-existent as duties of the State simply because the State may have supplied no machinery whereby the State itself can be subjected to compulsion.

Finally, in case the United States should build a railway, other than for the use of troops or for some similar end resembling that to which a private individual for his own private purposes might devote a railway

of his own, the United States, as matter of principle, must come under the same duties attaching to a public calling — the duty of serving all, of serving equally, and of serving on reasonable terms. It is true that the United States cannot without consent be sued in any court, whether the court be State, national, or international, and that hence there is no means known to ordinary law of enforcing such an obligation as this, and that thus in a sense the duty is merely moral; but some merely moral duties are perceptible by the law, and surely a duty precisely like one which the national government enforces in its own courts against others cannot, in case it rests upon the national government itself, be termed in any abusive or disrespectful or minimizing sense a merely moral duty. Perhaps analytical jurists may say properly enough that there is no duty unless there is a whip behind it; but a nation cannot say this with self-respect.

It follows, then, that if the United States enters upon any business belonging to the class called public callings, there rest upon the United States, as matter of principle, the same duties which belong to others who enter upon such callings — the duties of serving all, of discriminating against none, and of serving at a reasonable rate. It should be understood that such duties derogate in no way from the ordinary powers of government. No, as to the places where the United States may carry on these undertakings the United States must continue to have, to the same extent as before, full power of keeping the peace and all the other powers for which governments are organized; but by entering upon a career essentially non-governmental it will assume as to non-governmental matters, in this instance as to some sort of business belonging to the class of public callings, the duties belonging to all other conductors of such callings.

THE CANAL AS A "PUBLIC CALLING"

What callings are public? That is a difficult question to answer; but it is enough for the present purpose to point out that by both reason and authority the character of a public calling attaches to a canal. Indeed, a canal is a somewhat clearer instance than a railway; for canals, having preceded railways, were earlier examples of public callings; and,

besides, a canal, more obviously than a railway, renders unlikely the building of a competitor in the same neighborhood and for the purpose of meeting the same need.

Thus, independently of any treaty, one reaches the conclusion that by the rules of law observed in the United States, and in England also, the United States, whenever owning a canal of a commercial sort, that is to say, a canal not reserved for the war ships and other public vessels used by the government, is, as matter of principle, under the duty of permitting the canal to be used by all comers, and at rates which do not discriminate, and at rates which are reasonable.

And what are reasonable rates? On the one side it is clear that the total amount of income is not unreasonable if it simply pays cost of operation and of depreciation, a fair interest on the investment, and a sum equivalent to insurance against disaster. On the other side, it is clear that a total income greatly in excess of this would be unreasonable. What is more difficult is to determine the reasonableness not of the total income, but of specific rates. On this last point it is, however, easy to see that any rate which causes the person paying it to bear more than his fair share is unreasonable. This is in fact another mode of reaching the undoubted result that rates must not be discriminatory, for the burdening of some users tends to give an excessive return for the whole enterprise, unless some other users be unduly exempted; and, conversely, the exempting of some users, at least in cases where an enterprise is dependent wholly upon receipts, carries with it the burdening of others. Yet it is unnecessary to go through this mode of reaching the result; for the duty of any pursuer of a public calling to abstain from discrimination is a duty which rests firmly enough on its own separate foundation of justice.

Abstention from discrimination, it will be understood, does not mean that a small vessel must pay as much as a large one. Nor does it mean that certain classes may not receive special treatment, provided such special treatment is not arbitrary and does not place an unreasonable burden upon others. It is conceivable that the general principles of the law of public callings would permit granting to coastwise vessels some reduction in tolls; for a reduction might result in an increase in the income of the canal and thus might benefit all users, as in the case of rail-

way commuters. Reduction, however, is vastly different from exemption; for increasing the number of users by charging each user a toll of zero will give no increase in income.

THE PROFESSION IN THE TREATY

Thus far there has been no mention of the question whether the United States can be said to have made, as to the Panama Canal, an announcement of public service. Every one knows that there is such a profession in the Hay-Pauncefote Treaty of 1901. The words of the treaty will be given hereafter; but thus far it has seemed enough to show, without reference to international treaties, presidential messages, and the like, that if the United States, as owner of the Panama Canal, does make an announcement of public service, there rests upon the United States, as matter of principle, an obligation, as close to a legal obligation as can rest upon a government, to serve all comers, to serve them alike, and to serve them fairly.

Independently of treaty, it must be recognized as a sound general principle that, when a nation enters upon a business which is non-governmental, it assumes towards its own citizens and towards the citizens of other nations duties similar to those owed by private individuals engaged in similar business, and more specifically that this is true as to those businesses which are deemed public callings. It is not, however, in the present instance necessary to insist that such duties bind a nation in the absence of a treaty. It is enough to point out that certain peculiar duties attach to individuals engaged in certain occupations and then to insist that both the declarations of public officials and the words of treaties must be read in the light of the peculiar duties recognized and enforced against individuals by the ordinary law of the countries in interest.

It may well be true that an interoceanic canal is an enterprise so peculiar that, at least when the canal is the property of a nation, it would be desirable, from some points of view, that the ordinary rules as to public callings should not be applied to it; but nevertheless those rules are part of the atmosphere which surrounds whatever is done or agreed by men acquainted with the English and American system of

law, and consequently in writing or in reading any English and American treaty those rules normally will be taken to be present unless they are expressly said to be absent.

THE DOCUMENTS PRECEDING THE HAY-PAUNCEFOTE TREATY

It is now time to turn to the documents which led up to the Hay-Pauncefote Treaty of 1901. Do those documents show that the United States deemed it inappropriate for an interoceanic canal to be subject to the ordinary rules applicable to public callings? The very words of the essential documents must be quoted; and this will now be done.

In 1826, Henry Clay, Secretary of State, instructed the delegates to the Panama Congress that if a canal should ever be constructed through the Isthmus, "the benefits of it ought not to be exclusively appropriated to any one nation, but should be extended to all parts of the globe upon the payment of a just compensation, or reasonable tolls."

Again, in 1835, there was a resolution passed by the Senate "that the President of the United States be respectfully requested to consider the expediency of opening negotiations with the governments of other nations * * * for the purpose of * * * securing forever * * * the free and equal right of navigating such canal to all such nations, on the payment of such reasonable tolls as may be established, to compensate the capitalists who may engage in such undertaking and complete the work."

In 1839 the House of Representatives adopted a similar resolution requesting the President "to consider the expediency of opening or continuing negotiations * * * for the purpose of ascertaining the practicability of effecting a communication between the Atlantic and Pacific oceans by the construction of a ship canal across the Isthmus, and of securing forever, by suitable treaty stipulations, the free and equal right of navigating such canal to all nations."

In the Treaty of 1846, ratified in 1848, New Granada, now Colombia, "guarantees to the Government of the United States * * * that no other tolls or charges shall be levied or collected upon citizens of the United States * * over any road or canal that may be made by the Government of New Granada, or by the authority of the same, than

is, under like circumstances, levied upon and collected from the Granadian citizens"; and the purpose of this treaty is explained in President Polk's message to the Senate, in 1847, thus: "Neither the Government of Granada nor that of the United States has any narrow or exclusive views. The ultimate object * * * is to secure to all nations the free and equal right of passage over the Isthmus."

In 1850 the Clayton-Bulwer Treaty between Great Britain and the United States, having in mind chiefly a canal through Nicaragua, agreed that neither of the two countries will hold, "directly or indirectly, for the citizens or subjects of the one, any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other," and that each of them "shall enter into treaty stipulations with such of the Central American States as they may deem advisable for the purpose of more effectually carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the two oceans, for the benefit of mankind, on equal terms to all," and that the treaty shall extend in principle to any canal or railway across the Isthmus, and that it is understood "that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other state which is willing to grant thereto such protection as the United States and Great Britain engage to afford."

In 1858 Lewis Cass, Secretary of State, in writing to the United States Minister to Central America, said: "The progress of events has rendered the interoceanic routes across the narrow portions of Central America vastly important to the commercial world. * * * While the just rights of sovereignty of the states occupying this region should always be respected, we shall expect that these rights will be exercised in a spirit befitting the occasion and the wants and circumstances which have arisen. Sovereignty has its duties as well as its rights, and none of these local governments * * * would be permitted, in a spirit of

Eastern isolation, to close these gates of intercourse on the great highways of the world, and justify the act by the pretension that these avenues of trade and travel belong to them, and that they choose to shut them, or what is almost equivalent, to encumber them with such unjust regulations as would prevent their general use."

In the same year, Mr. Cass, writing to the British Minister to the United States, said, as to the Clayton-Bulwer Treaty: "The principle was that the interoceanic routes should * * * be neutral and free to all nations alike."

In 1881, James G. Blaine, Secretary of State, wrote to the United States Minister to Great Britain, that, while certain modifications were desired in the Clayton-Bulwer Treaty, the United States "frankly agrees and will by public proclamation declare at the proper time, in conjunction with the republic on whose soil the canal may be located, that the same rights and privileges, the same tolls and obligations for the use of the canal, shall apply with absolute impartiality to the merchant marine of every nation."

Thus far the documents unanimously indicate recognition of those duties which pertain to all public callings. Only one document of a contrary tenor has been discovered. That is the projected convention of 1884 between Nicaragua and the United States. That convention provided for equal tolls for all nations, excepting coastwise vessels of the two parties to the convention. Yet this convention was withdrawn by President Cleveland from consideration by the Senate; and thus the record remains unbroken down to the Hay-Pauncefote treaties.

Finally, the Suez Canal Convention of 1888, to which the United States was not a party, provided that "The Suez Maritime Canal shall always be free and open * * * to every vessel * * * without distinction of flag," and that "The High Contracting Parties, by application of the principle of equality as regards the free use of the Canal, a principle which forms the basis of the present treaty, agree that none of them shall endeavor to obtain with respect to the canal territorial or commercial advantages or privileges in any international arrangements which may be concluded."

The Suez Canal Convention may well serve as an introduction to the Hay-Pauncefote treaties; but it is hardly necessary for that purpose, for

the American and English law as to public callings and the documents of the United States prior to the Hay-Pauncefote treaties, as has been shown, throw adequate and harmonious light upon the probable intent underlying those treaties. It now remains to inquire whether the treaties use language which overthrows the doctrines of public calling which any one acquainted with law and with diplomatic history would expect to find recognized in them.

THE HAY-PAUNCEFOTE TREATY OF 1901

So much for English and American law and the chain of documents prior to the Hay-Pauncefote treaties, to which treaties discussion frequently is restricted.

The terms of the unratified Hay-Pauncefote Treaty of 1900 and of the ratified Hay-Pauncefote Treaty of 1901, now in force, are practically identical in all passages even remotely pertinent to the question of tolls.

The Hay-Pauncefote Treaty of 1901 expressly superseded the Clayton-Bulwer Treaty and said:

The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the 28th of October, 1888, for the free navigation of the Suez Canal; that is to say: 1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable. * * * No change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

In the light of English and American law as to public callings, the words of this Hay-Pauncefote Treaty — "open to vessels of all nations" — "on terms of entire equality" — "no discrimination" — "charges just and equitable" — sound not unfamiliar. In truth those passages of the treaty are much like extracts from the opinions of English and American courts.

SUMMARY

As has been pointed out, the United States, when it enters upon a world-wide public calling, such as the Hay-Pauncefote Treaty describes, might well be held, even without treaty stipulations, to have assumed the duties which are created by the law prevalent in the United States as to such a calling. As the courts have established for private individuals engaged in a public calling the rule of equality and justice, a government — even though it be not under the duty of being more just than the private individual — will have to give reasons of extraordinary strength for holding that when it itself conducts a public calling the rule may be inequality and injustice.

Again, whatever might be the duties of the United States in the absence of a treaty, the system of law used by both England and the United States furnishes the natural and necessary introduction and commentary for any treaty between these countries. This system has in it for public callings a doctrine requiring equality and reasonableness.

Further, as to an Isthmian canal, this doctrine has been assumed and recognized and asserted by the United States from the beginning.

Finally, this doctrine is the very essence of the words in the Hay-Pauncefote Treaty. If the treaty were silent as to the matter, the general law of England and the United States, and also the uniform recognition of the doctrine of equality in the past by the President, the Secretary of State, the Senate, and the House of Representatives, would make it difficult to insist that mere silence in the treaty would authorize the opposite policy of discrimination, but the treaty deals with the matter expressly and deals with it in harmony with what was to have been expected from the previous course of American and English law and of negotiation.

For the reasons given, it seems practically impossible not to come to the conclusion that the United States must give the services of the Panama Canal to all merchant vessels, and without discrimination, and on reasonable terms.

Hence, as the analogies of the law prevalent in the United States and England require uniformity, and as the current of official declaration from the beginning requires uniformity, and as the treaty in force re-

quires uniformity, the exempting — as distinguished from the subsidizing — of vessels engaged in the coasting trade appears to be impossible — impossible because in this matter the United States, though free, like every sovereign, from the compulsion of ordinary courts, has the honor to be in a place of responsibility, managing "a trust for mankind."

EUGENE WAMBAUGH.

THE NEW MOROCCAN PROTECTORATE

The signing of the Franco-Spanish treaty concerning the Moroccan question on November 27th¹ marks the last stage in the process of establishing a French protectorate in the Shereefian Empire. For years the European Powers have watched the steady decline of the "little Realm of the West," the continued loss of power and prestige by its sovereigns both in local and in national affairs, and the gradual disruption of the entire state. Ever since 1880, France, the nearest and most interested African neighbor, has been a keen observer of every move of the Sultans; and she has rendered the harassed and incapable rulers every assistance, diplomatic and otherwise, that these sovereigns would accept and the Powers permit. The French have seen from the first that nothing short of an European protectorate would suffice to save the Sultans, to ensure the establishment of an efficient administration, to afford ample security for life and property, and to give peace and prosperity to the long-suffering and oppressed people.

With infinite patience and with a careful consideration for the interests of the European states and the citizens of Morocco, the French have waited for events to mature that would render the time propitious for the setting up of such a protectorate, and that should induce the Powers to authorize her to undertake the work. Meanwhile, with remarkable tact and extraordinary diplomatic skill, they succeeded in keeping in close touch with all that went on in Morocco and in strengthening their own position there quietly and steadily, until the interests and influence of France far exceeded those of any other European Power. She wove such a net-work of influences both within and without the kingdom, that it became impossible for any foreign state, or even the Maghzen itself, to ignore or displace her. Aided by numerous border difficulties, between Algiers and the Shereefian Kingdom, and internal revolts calling for interference, France soon became the recognized arbiter of Moroccan affairs. In 1904 Great Britain and Spain recognized the paramount

¹ Printed in Supplement to this JOURNAL, p. 81.

interests of France in the country;² and at the Conference of Algeciras in 1906, called through the agency of Germany who questioned seriously the motives and good faith of France, the duty of organizing a police force for the realm and of assisting the Sultan to set up an efficient government was assigned to the French Republic and to Spain, while it was universally admitted that Morocco lay within the French "sphere of influence."³ The German Empire recognized this French supremacy on February 9, 1909, in an agreement with France, in which the latter promised to afford protection to German trade interests in Morocco;⁴ and in 1907 Great Britain, Spain and France signed a treaty to preserve the *status quo* in Northern Africa.⁵

During the same period, the French have been busy building a great colonial empire in Northern and Central Africa. It embraces the greater part of the Sahara Desert and extends from Algeria and Tunis on the north to the Congo river on the south, and from St. Louis (at the mouth of the Senegal river) on the West Coast to Lake Chad and the borders of Darfur (in the Anglo-Egyptian Sudan) — a region nearly as vast in area as the United States. Morocco is the natural key-stone of this French fabric and the control of it is essential to the proper security and development of this colonial empire. The French Republic, already a leading Mediterranean Power, was dreaming of and creating a "Greater France" stretching away from the shores of the same sea. The Shereefian Kingdom naturally forms one of the chief gates of such an empire. In fertility of soil, mineral wealth, and commercial possibilities, it surpasses by far the other northern gateways — Algeria, Tunisia and Tripolitania. France controls, also, the best portion of the trade of the Western Sudan, the Sahara and Northwest Africa. To complete her mastery over this valuable commerce and to render her hold effective and progressive, she must have a guiding hand upon the great trade routes that cross the desert southward from Morocco, as well as on the

² Declarations between France and Great Britain, April 8, 1904, and France and Spain October 3, 1904, *SUPPLEMENT* to this JOURNAL, Vol. 1, pp. 6 and 8.

³ General Act of the Conference of Algeciras, April 7, 1906, *SUPPLEMENT*, Vol. 1, p. 47.

⁴ Declaration between Germany and France, February 9, 1909, *SUPPLEMENT*, Vol. 6, p. 31.

⁵ *SUPPLEMENT*, Vol. 1, p. 425.

commerce of that realm itself. Bound up with Great Britain and Spain — and now with Italy — as she is, in the great and difficult task of preserving order and security among the restless Moslems of Northern Africa, it was most imperative, moreover, that she should control Morocco so that the European hold over the upper portion of the Dark Continent might be efficient and complete.

Backed, then, with the consent of the Powers and the support of England, France entered promptly and energetically, but thoroughly in accord with the spirit of her agreements with the Powers, upon the work of reform within the Shereefian Kingdom. At first she was unable to make any headway, owing to the civil war which broke out in the spring of 1907 between Abd-el-Aziz, the reigning Sultan, who had become unpopular by reason of his incapacity as a ruler and his inordinate proclivity for foreign support and things European, and his brother, Mulai-el-Hafid, an avowed opponent of all foreign interference. The French declined to intervene in the struggle; but contented themselves with occupying the harbor of Casa Blanca and the district of Chaouia at one end of the realm and Oudjda at the other, in order to protect the lives and property of Europeans. Finally, in August, 1907, Mulai completely defeated his brother and forced him to abdicate. The Powers, acting upon the advice of France and Spain, refused to recognize Mulai until he had secured control of the whole country and given his adhesion to the treaty of Algeciras and his promise to observe all the other official obligations of Morocco.⁶ After considerable delay, he was induced to accept the inevitable and was officially recognized as Sultan in December, 1908,⁷ but it was not till February, 1910, that France was able to secure from Mulai-el-Hafid a treaty⁸ recognizing her special interests in Morocco and agreeing to accept her assistance and loans in order to place his government on a stable basis.

⁶ See Franco-Spanish note to the Powers, September 14, 1908, and note sent to Mulai Hafid by the Powers, November 18, 1908, *SUPPLEMENT*, pp. 101, 103.

⁷ See final note of recognition of Mulai Hafid, December 17, 1908, *SUPPLEMENT*, p. 105.

⁸ Finally signed in Paris on March 4, 1910; see terms in *Documents Diplomatiques*, 1910, *Affaires du maroc*, V, p. 343; *SUPPLEMENT* to this JOURNAL, Vol. 6, p. 43. A similar treaty was concluded between Spain and Morocco on November 16, 1910; see terms in *SUPPLEMENT* to this JOURNAL, Vol. 6, p. 54.

Before the movement to carry out this agreement was well under way, difficulties arose once more between several of the chieftains and the Sultan's Government, owing to the reimposition of certain taxes that Mulai-el-Hafid had promised on his accession not to levy and to the tyranny of his prime minister. On January 14, 1911, Lieutenant Marchand and several comrades were slain by the Zaer tribesmen near Rabat; and soon several tribes were in open revolt. The movement spread. A brother of Mulai-el-Hafid was proclaimed as a rival Sultan; and in a few weeks a great portion of the country was in arms. The warring factions converged on the capital, defeated the Sultan's forces, and finally besieged him in Fez. On May 21, 1911, the French relieving column, composed mainly of local levies, reached the beleaguered sovereign; and the revolting tribesmen were dispersed without difficulty. A number of chieftains whose grievances were real and whose complaints were fully justifiable, were won over by conciliatory measures and friendly treatment. The offending vizier was dismissed from office; and the French entered energetically upon the task of restoring order and security in the country.

Just at this interesting and critical moment, the German Government decided to send the warship *Panther* to Agadir. Their ostensible and publicly announced purpose was to afford proper protection to certain German traders and German commercial interests in that neighborhood. Their real object was something quite different. The French Government had taken great care to keep all the Powers posted concerning all their movements in Morocco and their advance to Fez, and to see that each step in their program was in strict conformity with the stipulations of the treaty of Algeciras. There were no serious grounds for complaint on the part of any of the European states; but it was evident from the course things were taking that, through no fault or aggression on the part of the French officials, the establishment of a French protectorate over Morocco had become inevitable. Everyone, the Germans included, felt that this was the only possible solution of the problem. "France was the only Power which could restore order in Morocco," said Herr von Bethmann-Hollweg in his opening speech to the Reichstag on this question on November 9, 1911. "The greater the freedom given to France, the greater the security and the responsibility for order." But

the German leaders were of the opinion that it should not be permitted to take place without an official protest on their part for two reasons. In the first place, it would be a reflection on their diplomatic acumen and a blow to their national pride, if a matter of so great importance to the European states was finally adjusted without their co-operation, or without their advice having been sought. In the second place, by making the protest they would be in a position to take advantage of a rare opportunity to make political capital out of a situation, that might accrue to their advantage in the shape of increased commercial rights and privileges, or even territorial gains, in Morocco or elsewhere in Africa.

In the early stages of the French advance to Fez, the German Foreign Office had called the attention of the French Government to the fact that such action would result in the establishment of a protectorate in Morocco. The French on the other hand, in their communications to Germany,⁹ general circulars to the Powers,¹⁰ and instructions to General Moinier, emphasized clearly the great necessity for the expedition, to protect the lives of resident foreigners and European consuls and to preserve the Shereefian Government, and stated that the occupation of Fez was only to be temporary. The Germans, however, reserved the right to resume complete liberty of action, as soon as the French forces were established at the capital.

Meanwhile, difficulties had arisen with regard to the application of the commercial and economic provisions of the Franco-German agreement of 1909. The French wished to interpret them in accordance with their general policy of free trade, adopted under pressure from England and Spain in 1904 and of the Powers at Algeciras; but Germany was inclined to insist on a narrower principle of economic monopoly of individual sections divided proportionally to the existing spheres of influence. In this connection, there arose the question of "compensations," economic or commercial, for the Germans, in case the French assumed political and territorial advantages. It is not known with whom the idea first originated; but it came out in the conversations between M. Cambon and

⁹ *Documents Diplomatiques*, 1912, *Affaires du Maroc*, Vol. VI, pp. 179, 189-193, 221, 239, 247, 289.

¹⁰ *Ibid.*, pp. 181, 219, 235, 261, 288, 303, 342-343.

H. Kiderlin-Waechter held in Berlin on June 11th¹¹ and at Kissengen on June 20th and 21st. "If we only talk of Morocco," said Kiderlin, "we cannot succeed." "You are right," replied Cambon. "If you desire to have some portion of Morocco, the conversation had better not begin. The French opinion would never allow it on this land. One might seek elsewhere." The idea of "compensation" was, however, new to the French ambassador who had no instructions along this line; but he agreed to bring the matter to the attention of his government. On June 22nd M. Cambon wrote to Paris, describing the whole interview in detail and asking for instructions, but added: "It is no longer open to us to draw back, and we must now decide what elements are to form the basis of further conversations."¹²

It is well known that as early as May, 1910, France and Germany had opened conversations with a view of securing co-operation in trade and transport facilities in the Cameroons and the Congo; but no agreement was reached, although a tentative arrangement had been worked out just before the fall of the Briand-Pinchon Cabinet in February, 1911. M. Caillaux, minister of finance in the new cabinet, opened some secret negotiations with the German Foreign Office, which led them to infer at least that he and his friends were willing to concede some "compensations" in the French Congo, or elsewhere, to secure a final settlement of the Moroccan question. M. Caillaux became prime minister on June 28, 1911; and the *Panther* was sent to Agadir on July 1, to give Germany a good "handle" to use in the negotiations which were sure to follow.

As soon as the news of the German move on Agadir officially reached the French Cabinet, the French Foreign Office approached the British Government to learn its attitude in the matter. Finding that their views practically coincided, and being assured of a cordial and firm support by Great Britain, the French Government consented to open negotiations with Germany. Secret informal discussions, technically known as "conversations," on the Moroccan question ensued, lasting, with but one serious interruption, from the middle of July till the 4th of November. The diplomats of Wilhelmstrasse began by claiming that Germany was

¹¹ *Documents Diplomatiques*, 1912, *Affaires du Maroc*, VI, pp. 349-350.

¹² *Ibid.*, 372-374; see also M. Selves' speech on Dec. 14, in the Chamber of Deputies, *London Times* for Dec. 15, 1911.

entitled, either to an "economic condominium" with France in Morocco, which would ensure to her an equal share with the French in the commercial and economic development of the land, or to "compensation" elsewhere, which she intimated might properly take the form of the cession of the whole of the Gaboon district and that portion of the French Congo lying between the Atlantic ocean and the Sanga river. In the event that the latter alternative alone was to be considered, Germany was prepared to turn over Togoland and a portion of the Cameroons to France in order to facilitate matters and equalize the larger transfer by France. The German contention for a position of special privilege in Morocco and the claim by the press of the Fatherland that their country was "fighting the battle of the world," seem not to have been well taken. By the Conference of Algeciras and her own promises, France was irrevocably committed to an "open door" policy of commercial freedom in Morocco; and Great Britain and France were enjoying over 72% of the trade of that country while Germany's share had not yet reached 13%.

France stood firm, refusing to admit that Germany possessed any special position of privilege in Morocco or was entitled *by right* to any "compensation" for giving France a clear field there, and insisting that the *status quo* of the Shereefian Empire must *first* be clearly and firmly established, before there could be any question of reward or "compensation" raised. Mr. Asquith and Mr. Lloyd-George in England made forceful speeches declaring Great Britain's determination not to permit any encroachment upon her rights and interests in Northern and Western Africa. This firm attitude, combined with a financial depression in Germany which, on September 9th, almost resulted in a panic on the Berlin bourse, forced the Imperial Government to change front. The French financiers came generously and promptly forward with offers of assistance through the Swiss banks; and the day was saved. The French point of view was accepted as a basis; and, thereafter, the negotiations were conducted in a conciliatory, straightforward and business-like manner on both sides.

The program of France included three main points. First, France was to have a free hand in Morocco, in order that she might successfully establish order and security, create an efficient and responsible government, and promote the economic, political and moral development of the

country. But her position must be carefully and explicitly defined with absolute guarantees, so that there will be no further irritating and disrupting interference by any of the European states. Secondly, the commercial position of all the European Powers must be justly and explicitly defined and their respective rights carefully and fully protected, and a definite understanding reached concerning the new methods of administering justice to both natives and foreign residents and of affording protection for the lives, property, and financial or commercial interests, of all concerned. And, in the third place, if it was possible to reach a joint agreement on all these points, France would then be willing to give certain economic guarantees that would assure the Powers of equal commercial protection in the Shereefian realm, and to consider the question of territorial "compensation" in the French Congo. But the French Government let it be understood that, in case they did decide to make a gift of territory to Germany, it was not because of any unusual pressure or of any right, recognized or fancied, but simply because of their desire to be conciliatory and to see the Moroccan question, so vital to them, settled once and for all time.

On this basis the discussions were renewed and continued till October 15th, when it was announced that an agreement had been reached and initialled on the first two headings. The diplomats of the two countries entered on October 16th upon a "conversation" on the question of a land cession in the French Congo. Germany began by asking for an extensive area of some 16,000,000 hectares of land lying south and east of the Cameroons, bordering on the Ubangi and Congo and possessing a seaboard outlet. This would have given the Emperor a fine piece of the Congo country, brought him to the banks of the greatest waterway of Central Africa, and put him in close touch with the great Belgian Congo trade, a long cherished ambition. Unfortunately this would cut in two the French Congo, isolating the Northern portion and making a great break in that magnificent stretch of French territory reaching from the Mediterranean to the Southwest Coast, of which the French nation is justly proud. Then, too, this region embraced some of the best developed sections of the French Congo where some 15 chartered companies have invested over \$5,000,000, of which the Ngoko-Sanga Development Company is the chief, and are taking out approximately \$1,250,000

worth of rubber yearly. So the French Government could not afford to make so large a concession, particularly as that portion of the duck's beak of the Cameroons offered by Germany in exchange was in no way a counterpoise to this, and since the French people remained steadily and unanimously opposed to any vital transfer of land in their Congo possessions.

In the course of several conferences, the problem was reduced to practically these limits: Germany needs an outlet on the Ubangi-Congo waters; how can this be best accomplished in a fair and equitable manner without doing any vital injury to French interests? After a careful study of the situation and an extended discussion of all the points at issue, the representatives of the two governments reached a satisfactory agreement which was made public on November 4, 1911. This Franco-German treaty¹³ consisted of four documents: the first concerned the future status of Morocco, the second described the proposed territorial adjustments in Equatorial Africa, the third included two "notes" relating to the delimitation of the new frontier and the terms of lease of certain lands to France in Equatorial Africa, and the fourth comprised four "explanatory letters" exchanged between the German Foreign Secretary and the French Ambassador. It took the form of an expansion of the earlier agreement of 1909 between the two signatory Powers. By the first part, France is to enjoy complete freedom of action in the introduction of reforms and in the supervision of the internal affairs of Morocco, after an agreement with the Shereefian Government. She shall be free to employ her police or military forces, to extend her control or define her authority more clearly, and to take whatever administrative or financial measures are necessary for the establishment of good government, the revival of national credit and the development of the resources and trade of the country. The conduct of the foreign affairs of the Shereefian Kingdom is to be in the hands of the French, who will represent the Sultan in his dealings with foreign Powers and look after the interests of his subjects abroad. On the other hand, France gives adequate promises concerning protection and equality of treatment in the trade and commerce of the Sultanate under her

¹³ *Documents Diplomatiques*, 1912, *Affaires du Maroc*, VI, pp. 622-635, SUPPLEMENT to this JOURNAL, Vol. 6, pp. 4, 62, 111, 113.

protectorate. There shall be no differential customs dues or other tariffs, or any partiality shown in the levying of mining or industrial taxation. The construction and management of the new railways is to be under French control, but other Powers are to participate on an equitable basis in the letting of the contracts. The present system of consular courts is to be abolished as soon as a satisfactory judicial system can be worked out; but, in the meanwhile, a provisional plan of settling all civil suits, particularly those in which a foreign national is a party, by arbitration under French supervision, has been adopted.

In the second portion, or territorial treaty, the question of land cessions was restricted entirely to the Congo country. Here the French agreed to transfer to Germany a portion of the French Congo, lying directly east and south of the Cameroons and consisting of some 73,000-92,000 square miles of territory, or about the area of Nebraska. The value of the district is unknown and the greater part of it is still unoccupied by Europeans and undeveloped. It varies in character from unhealthy swamps and arid plateaus to promising hill country and extensive rubber forests in which the *Compagnie Coloniale du Congo Français* and the *Uame Nana Compagnie* have monopolies guaranteed until 1930. The new line of the Cameroons is to run from Massoti on Corisco Bay eastward to Wesso on the Sanga river, where, leaving Wesso to France, it turns south as far as the junction of the Sanga and Congo rivers. Then it proceeds directly north to Bera Ndjoko and thence along the Lubai to Mongumbo on the Ubangi river. After following this stream for a few kilometers, the limit of German rights both here and on the Congo being limited to between 6 and 12 kilometers, the boundary will turn northwest and proceed till it strikes the Logoné river, along whose banks it goes northwards until the juncture of the Shari is reached. The small region, about the size of Alsace-Lorraine, lying between the Shari and the Logoné rivers and the 10° of north latitude, is to be transferred to France. The Republic is to secure a trade route from her Shari river lands to Northern Nigeria by way of the Benue river, which will be a great commercial advantage in the development of the Upper Congo and Lake Chad trade. Each state is to have the right to free passage across the territory of the other, and to construct railways and telegraph lines across, if necessary to maintain

direct communication; but the French are to retain control of the whole telegraph line along the Ubangi.

One of the most interesting of these agreements was the decision to submit to arbitration all disagreements that may arise in the future working out of the various articles of these treaties. This last point was carefully elaborated in one of the "explanatory letters" annexed to the main articles of the treaty. In the other letter, Germany urges that the Tangier-Fez railway be constructed before any of the other projected lines, and demands that she be assigned a fixed share in the construction which should include the connecting up of the mining regions with the main line as far as possible.

The arrangements outlined above will not have any serious effect upon the French position on the Congo, so long as the Ubangi-Congo waters remain an international stream open freely to the trade of the world. Germany will doubtless, on the other hand, be greatly benefited in time by access to the Congo and the Ubangi, and by the establishment in this way of a direct connection between the Cameroons and the great Congo basin. In addition, she will be afforded an outlet for the produce and commerce of the Eastern Cameroons, which will prove in all probability cheaper and more expeditious than any route to the coast they now possess. The general outcome of the long months of diplomatic maneuvers and discussions by France and Germany will, therefore, be the creation of a French protectorate over Morocco and the substantial expansion of the German Cameroons with outlets on the Ubangi and Congo waters and on the sea coast. These agreements, however, could not go into effect until they have been approved by the French Senate and National Assembly and by the Bundesrat and the German Committee on Foreign Affairs, all of whom have to be consulted when cessions of territory are under consideration.

The reception of Herr von Bethmann-Hollweg's explanation of the German "case" by the Reichstag on November 9, 1911, was chilly in the extreme. No government action in recent years has been received by the popular assembly with such a lack of enthusiasm. This was due, not so much to any deep-seated opposition to the treaties *per se*, as to the desire of many representatives to make political capital of them in the approaching elections and to the feeling, particularly among the

ranks of the opposition, that the government had allowed itself to be brow-beaten by England. The resignation of Herr von Lindequist, Imperial Colonial Secretary, and of Herr von Dankelmann, chief of the Colonial Office, at this time caused considerable comment and complicated matters somewhat; but they were due very largely to the fact that these officials declined to assume the responsibility for the agreements and to explain them to the Reichstag, leaving these onerous duties to fall entirely upon the shoulders of the Chancellor, Herr von Bethmann-Hollweg, and the Secretary of Foreign Affairs, Herr von Kiderlin-Waechter. The efforts of these statesmen, however, were successful, the treaties being speedily approved by the Bundesrath upon the favorable report of the Committee on Foreign Affairs.

In France, the Chamber of Deputies took up the matter promptly; and, after the Foreign Affairs Committee had expressed its opinion with favor on December 3rd and a spirited debate lasting three weeks had ensued, approved the treaties by a vote of 393 to 36 on December 20th.¹⁴ Some 150 delegates from the eastern provinces refrained from voting out of sympathy with Alsace-Lorraine; and a large portion of those who cast their ballots for the agreements, did so with "la mort dans l'ame," so strong is the feeling in France against the cession of any territory, once French soil, to foreign nations and particularly to Germany. The Senate then began its consideration of the proposition; and, on December 24th, appointed a committee¹⁵ of 20 able and experienced statesmen, including such well-known and skillful diplomats as MM. Pichon, Clemenceau, Poincaré, and Bourgeois, to investigate thoroughly the whole affair from its inception. In the course of the proceedings of this committee, it came out that, while the French Foreign Office was regularly engaged in the discussion of the Moroccan question with Germany, private negotiations were carried on by some member or members of the French Government with influential persons in the German service in such a way as to convey to the German authorities the impression that France was ready and willing to make "compensations" to Germany. On January 9, 1912, when forced to the wall in the committee, M. de Selves, French Minister of Foreign Affairs, refused to deny these allegations. The following day he resigned his portfolio; and, after

¹⁴ *London Times*, Dec. 21, 1911.

¹⁵ *Ibid.*, 25 and 27, 1911.

trying vainly for two days to reconstruct his cabinet, M. Caillaux, the Prime Minister, was compelled to withdraw from office. M. Raymond Poincaré, a man of splendid abilities who enjoyed the respect and confidence of all parties, was appointed Premier on January 13th and formed the strongest and most capable cabinet that France has had for some years. On January 24th the committee brought in a favorable report; and, after an extended and lively debate, the Senate showed its confidence in M. Poincaré by approving the treaties on February 10th by 202 votes to 42.¹⁶

Thus was closed one of the most remarkable diplomatic episodes of modern times. The attitude of the German press and of many of her prominent men during the extended negotiations resulting from the Agadir incident, is not above criticism. Bitter attacks on Great Britain were indulged in for reasons wholly without adequate foundation. Threats of war were current and a great deal of unnecessary bluster was resorted to, with the hope of intimidating France or England. And, during a great part of the period, the German Government had to conduct the negotiations without the aid of any sustained or wide-spread popular support or sympathy. Under all the circumstances, it is undeniable that considerable credit must be given to the Imperial officials that their country issued from the controversy with dignity and with some tangible and substantial rewards for their efforts. On the other hand, the French conducted themselves well, displaying a most commendable spirit of conciliation, mingled with dignity and poise. There was no commotion, no waste of energy, no frantic scrambling for rights and privileges. The work of her statesmen and diplomats, particularly of M. Jules Cambon, is deserving of high praise; while the government and people stood together in mutual confidence and serenity of purpose, more united than at any other period in recent years. "The mingled dignity and conciliatoriness with which the French Government and the great mass of the French opinion have treated these serious and difficult negotiations throughout," wrote the *London Times* editorially on September 12, 1911, "have done not a little to confirm the credit which their country has acquired in Europe by the conduct of former discussions." France has thus placed herself well in the forefront of the

¹⁶ *London Times*, February 12, 1912.

remarkable movement for universal peace, which has assumed such significant proportions during the past quarter of a century. She has demonstrated how it is possible, in the face of threats of war and of the most intricate and delicate of situations and at a time of great national crisis and excitement, to hold successfully in check two heated nations and to carry through to an ultimate and reasonable conclusion political and commercial negotiations of the highest importance, not only to her neighbor and herself, but to Europe as well. And she has thus given to the world a splendid example of the higher and newer type of twentieth century diplomacy, the diplomacy of the New Internationalism.

Nothing remained, after the ratifications of the treaties had been exchanged on March 12, 1912, to ensure the validity of the agreements, but to secure the approval of the states which had signed the Algeciras treaty, the co-operation of Spain, and the consent of the Shereefian Government. The first of these acts was speedily and easily effected; but the last two were consummated only at the expense of considerable time, patience and tact. The special interests and rights of Spain in Morocco¹⁷ had been recognized and protected by France in treaties with Spain in 1902, on October 3, 1904, September 1, 1905, and in May, 1906; and France had kept her ally informed of the progress of the late negotiations with Germany. At length, after a detailed conference with England during most of November upon the future status of Tangier and the precise lines of delimitation for the French and Spanish territorial claims in Morocco, the French engaged the Spanish authorities, on December 7th, in a series of confidential negotiations on the question, at which the British Minister to Spain was present. A great many intricate and delicate problems were involved; but they were centered about three main issues: the nature and extent of the Sultan's control over the Spanish sphere of the empire, the construction and control of the proposed railway from Tangier to Fez (part of which would have to pass through the Spanish zone) and the collection of customs dues and control of the public debt belonging to that portion of the Sultan's domin-

¹⁷ She had marked out three zones in Northern Morocco, the Riff and its hinterland with headquarters at Melilla, the district of Tetuan with the harbor of Ceuta, and the Spanish Gharb with the city of Alcazar and port of Laraché; and she had spent approximately \$40,000,000 since 1900 to secure these holdings.

ions under Spanish protection. The "conversations" were prolonged to an unexpected and extraordinary degree, owing to the varied character of the questions at issue and peculiar difficulties that arose in the path of the negotiators; and the definite agreements were not reached until October 25,¹⁸ 1912. In these, it was provided that Spain, while retaining the control of the customs within its zone, should pay an annual sum approximating \$100,000 towards the interest and amortization of the Moroccan debt; that the boundary question should be settled by certain minor transfers of land — for a portion of the Riff country, Spain being given a good-sized piece of territory adjoining her colony of Rio de Oro on the north — and by a commission of delimitation to mark the precise frontier; that the international position of Tangier should be settled by a special commission; that the Spanish zone should be administered by a Spanish high commission assisted by a Khalifa resident at Tetuan and appointed by the Sultan from two persons nominated by Spain; and that the Tangier-Fez railway should be built by a single company, of whose capital stock the French shall have 56%, the Spanish 36% and other countries, if desired, 8%.¹⁹ The attainment of this happy solution was received with great satisfaction by the leading statesmen and people of the two interested nations, and with considerable relief by the European states, some of whom had feared an open rupture more than once during the negotiations. The credit for their successful termination is due to the patience, the tact, the good judgment, and the breadth of view displayed by M. Geoffray, the French Minister to Spain, and to the sincerity and conciliatoriness of Señor Canalejas, the Spanish Premier.²⁰

Meanwhile, the French were taking active and consistent steps to set up a protectorate over Morocco. On November 9, 1911, Mulai-el-Hafid was induced to give his consent to the Franco-German treaty of Novem-

¹⁸ Signed at Madrid on November 27 and approved by the Spanish Cortez on December 17 by 216 votes to 22. *Times*, December 18 and November 28, 1912; SUPPLEMENT to this number of the JOURNAL, p. 81.

¹⁹ *Times* for November 27 and 30, 1912; consists of 29 articles and a protocol on the Tangier-Fez railway.

²⁰ It was most fortunate that Señor Canalejas lived until the terms of this treaty were completed. He was assassinated by a fanatical socialist on November 12, 1912, while the agreement was actually concluded on October 25.

ber 4th; and on January 18, 1912, a committee with M. Regnault as chairman was appointed to investigate the question and draw up a plan for the organization of stable government in the Shereefian Kingdom. This committee made its report on the 28th of the same month, urging that a French Resident-General be appointed and that a pacific and temporary military occupation of Morocco be undertaken at once, but recommending the use of the local Shereefian administrative system and officials wherever possible, with the remark that the French Resident-General and counselors will give the necessary "impulse and direction to the services of justice, finance, public works and domestic administration."

M. Regnault, French Minister at Tangier, and especially qualified by training and experience, was appointed at the head of a special commission which should visit Mulai-el-Hafid at Fez and secure his consent to the establishment of the proposed protectorate. M. Regnault left Paris on March 1st, reached Fez on March 24th, and obtained the signature of the Sultan to the protectorate treaty on March 30, 1912. Unfortunately his visit was marred by the insistent demands of Hafid to be permitted to resign and the serious mutiny of the Shereefian troops which broke out in Fez on April 17th, but was easily put down by General Moinier in three days time. Early in May, General Lyautey was appointed Resident-General, with the approval of the Sultan, who telegraphed his satisfaction and promises of co-operation on May 2nd; but he did not reach the capital of Morocco till the 24th. Two days later a serious rising of the tribes occurred, Fez itself being immediately attacked and besieged until June 5th, when it was successfully relieved by French forces. A wide-spread opposition to French rule manifested itself throughout the country, which was fomented and strengthened by the efforts of two pretenders to the throne. For four months the situation was uncertain and exceedingly precarious. But the French acted promptly and had no difficulty in disposing of el Roghi, the pretender of the north, and in driving back into the desert Sidi Mohammed Hiba of Tisnit in Sus, whose father, Mal Arnin, had been a celebrated religious leader and magician of the Sahara and who, supported by a large following, entered Marrakesh on August 18th. Firmness, coupled with a just and conciliatory spirit, enabled General Lyautey, who won the

respect and confidence of all the chiefs and leaders with whom he came in contact, to restore peace and order within a comparatively short time.

Meanwhile, Mulai-el-Hafid left Fez for Rabat, as soon as the siege of the capital had been raised, under guard of several regiments, which he reached on June 13th. His younger brother, Mulai Yusef, was left as Viceroy at Fez. After consideration, it was decided to carry out an agreement made the previous October with the Sultan, at his own special request, that he be permitted to resign when a French protectorate was set up. It was evidently a necessary and wise corollary to the establishment of French control in the country, because of the personal unpopularity, instability and viciousness of the Shereefian ruler and by reason of the fact that he had secured the throne as the proclaimed leader of the anti-foreign party. Accordingly, Mulai-el-Hafid abdicated on August 11th, being promised the sum of \$80,000 down and an annual income of \$70,000; and on August 13th his brother Yusef, who is described as a man of moderation and piety enjoying considerable prestige in the Mohammedan world, was proclaimed Sultan, after being duly elected by the Ulemas in accordance with the customs of the country.

The French Chamber approved the protectorate treaty on July 1st by a vote of 460 to 79. On July 19th the Berne conference between France and Germany to arrange for the transfer of the Congo lands and the delimitation of the new boundaries, finished its sittings; and a definite agreement fixing the precise boundaries of the German and French possessions in Southwest Africa was signed by their respective representatives in Paris on September 28, 1912. Thus the terms of the treaties of November 4, 1911, were worked out to the satisfaction and to the promotion of the interests of all the parties concerned.

The protectorate treaty²¹ shows clearly the nature and the extent of the future French control in Morocco. A new regime is to be instituted, "admitting of administrative, judicial, educational, economic, financial and military reforms," through the assistance of the French and by means of a reorganized Shereefian Government. The exercise of the Mohammedan religion and the preservation of the religious institutions, together with the traditional position and prestige of the Sultan, are

²¹ SUPPLEMENT, this JOURNAL, Vol. 6, pp. 207-209.

guaranteed. The French Government is pledged, moreover, to protect the person and throne of His Shereefian Majesty. To ensure this end, and to provide for the maintenance of good order and public security throughout the country, until the new regime shall be in full running order, France, after consultation with the Maghzen, is to undertake such military occupation and police supervision as was deemed necessary. This the French proceeded to do at once, raising their forces in Morocco to 32,000 during the summer and setting up a military regime throughout the country on the basis of a plan prepared by General Lyautey before he left Paris. Morocco was divided into five military districts, Fez, Meknes, Rabat, the Chaouia, and Marrakesh, over each of which was placed a superior officer and staff with the power of enforcing order, maintaining intelligence offices, and controlling posts, circles and stations. The work of reorganization is proceeding slowly but surely, the French not attempting any general subjugation of the whole country, but remaining content with keeping the main trade routes open and maintaining order. The military and police forces of the Sultan are being reorganized on the French model with the object of utilizing as many of the natives as possible in this branch of the public service, where they can rise to the rank of lieutenant, it not being considered safe or wise to admit them to the higher positions at present.

While the promulgation of all decrees and the new reform measures must be done in the name of the Sultan and with his consent (presumed), it is evident that the real ruler is to be the French Resident or Commissioner General, to whom is entrusted the power of approving all decrees of the government, of acting as an intermediary between the Sultan and all foreign Powers, and of handling all "matters relating to foreigners in the Shereefian Empire." He is of necessity a military officer; and it is the intention of the French that, owing to the critical and disturbed state of affairs prevalent throughout the land and the pressing need of a firm and powerful, but judicial and skillful, hand at the helm, Morocco should remain for a time practically under military rule. But, no doubt, this will be replaced, as soon as it is practical and advisable, by a well-organized civil administration, as was done in Tunis. In any case, it is expected that the little "Kingdom of the West" will hereafter constitute a part of French territory, an adjunct of the Republic preserving

its own integrity and institutions and a fair amount of local autonomy, which, while enjoying the protection of the French and the friendship and co-operation of their financiers and administrators, has lost its international position forever. The diplomatic and consular agents of France will hereafter undertake the representation and protection of Moroccan subjects and their interests abroad; and the Sultan can conclude no international act or make any public or private loan, or concession, without the approval of France.

The establishment of a French protectorate in Morocco is, however, demanded to protect the commercial interests of all the European states, as well as to safeguard the colonial enterprises of the French in Northern and Western Africa, and to preserve life and property within the domains of the Sultan. The sufferings of the masses under a long rule of misgovernment, corruption and oppression, alone require, in the name of a generous humanity, the intervention of a strong, honest and efficient government. The period when France could have acted solely in the capacity of a friendly adviser is past: and it is now impossible for her to carry through the long-delayed and greatly needed reforms, or to give an effective administration to the country, without having her hands firmly on the wheels of state.

Such a form of intervention is nothing new in African annals; for it has been practiced in various forms during the past thirty years by all the European Powers having colonies on that continent. It has, in fact, become so frequent a step in the territorial expansion of modern states, that it has taken on an important international character and its special status has been recognized definitely in international law. In establishing a protectorate over a civilized or semi-civilized people, three conditions are necessary. There must be a sort of condominium, or division of the territorial sovereignty, between the local rulers and the protecting state. All other states, excepting the protecting state, shall be excluded from exercising any authority in the internal affairs of the state. And, thirdly, the protecting state shall represent the protected country and its people in all their relations with the other Powers. It was established as early as the Berlin Conference in 1885, that any state setting up such a "protectorate" must assume the "obligation to insure the establishment of authority — sufficient to protect existing rights and,

the case arising, freedom of trade and of transit on the conditions that may have been agreed upon."²² This implies a consent to assume civil and criminal jurisdiction over all foreigners resident within the country, which has been interpreted to include the protection of the lives and property of foreigners and missionaries as well.

To legally create a "protectorate," a state must obtain the consent of the native community needing or wishing protection and of all those European Powers which through their control of neighboring regions, the possession of large trade or financial interests within the country to be protected, or the existence of some intimate relations between their citizens and the subjects of that state, may have "special interests" there. This is usually done by means of written agreements or treaties. In the case of the Powers, this might be secured by means of general conferences, such as that of Algeciras where France and Spain were authorized to assist the Government of Morocco in establishing its authority; but, as a matter of fact, it has usually been worked out by special treaties between the states interested. Too often these treaties have been arranged among the Powers on a "compensation" or exchange of recognition plan with little regard for the real wishes of the protected states.²³ And the legality of "protectorate treaties" between states giving and those receiving protection seems never to be seriously questioned even when they are secured by diplomatic pressure, a display of force, or a military occupation.

The request for protection by a weak or inefficient government might be sufficient cause for the extension of such protection; but in practice it has been recognized that a state offering protection must previously, by colonization or the creation of sufficient commercial or financial interests within its borders, have secured a special "sphere of influence" there. And the act must be preceded by due notification to all the Powers in any event. All this France has done with regard to Morocco, and more. For the French Government is irrevocably committed, by her treaties and promises to the Maghzen and the public assurances of

²² Article 35; *SUPPLEMENT* to this *JOURNAL*, Vol. 3, p. 24.

²³ Such as the Franco-British treaty of 1890 when Great Britain and France recognized each other's protectorates in Zanzibar and Madagascar, and the Anglo-German treaties of 1890-1893 whereby the protectorates of England and Germany in East Africa were officially established.

her leading government officials, to a policy of justness and equity and political integrity. They have agreed to stop all reported abuses in connection with the sale and occupation of land by foreigners in Morocco, to protect the rights and customs of the natives, to encourage the loyal co-operation of the Moroccan people by every legitimate means, and to employ their chiefs and leaders as far as possible in the administration of local affairs. "France must make herself loved as well as respected," said M. Poincaré in his explanatory speech in support of the protection treaty on July 1, 1912. General Lyautey, the first Resident-General, is an administrator of ability, accustomed to handling men and thoroughly conversant with the conditions and needs of the country; and in the first six months of his incumbency,²⁴ he has been remarkably successful in restoring peace and order and in winning the respect and confidence of all with whom he has come in contact. The work entailed in introducing the new administration is enormous and the difficulties numerous. Everything in the country has to be reorganized; but the highest authorities in France on finance, land-tenure, Mohammedan law, education and politics have been busy for some months preparing the way and working out plans for the regeneration of this country, which it is expected they will be able speedily to introduce with the assistance and co-operation of the natives.

In spite of the permission given France and Spain at the Algeciras Conference, they have been unable to introduce any permanent order or system of policing in the country outside of such districts as Chaouia, Oujda and Melilla, where it was necessary to set up a temporary military occupation. Here a fairly satisfactory and efficient system of rule has been established. In other portions where the French had attempted to interfere, such as in the region of Fez, Tangier and the Gharb, serious mistakes have been made, which it will take considerable time to eradicate from the popular mind. General Lyautey has already removed the worse abuses and modified the existing conditions in Northern Morocco materially; and he has reorganized the government of Marrakesh and the southern portion promptly and effectively, appointing to all the important posts the leading, the most trustworthy, and the

²⁴ See summary of his work and report given in the *Times* for December 6 and November 9, 1912.

most capable chieftains of the region. Thus a good beginning has been made in the work of reform and reorganization; but the task of establishing French control over the whole Shereefian Kingdom, similar to that exercised by them in Tunis, is a most difficult and delicate affair, requiring great patience, careful planning, and a rare combination of diplomatic tact and administrative skill. It must be accompanied by the immediate construction of certain important public works, such as railways from Tangier to Fez and from Casa Blanca to Marrakesh (together with a harbor at Casa Blanca) and good roads throughout the country, the erection of public schools, hospitals, post-offices, irrigation plants, and other agencies of civilization and self-help. And General Lyautey is asking for a loan at once of \$60,000,000, with which to effect this very work.

To win over a stubborn, superstitious and ignorant population to the acceptance of a form of government they dislike, the presence of foreigners they distrust and detest, and of customs and methods which they do not understand, is an exceedingly delicate and arduous task. As one of the Moorish statesmen said: "This country is not like the land of the Nazarenes and cannot be made like it in haste." The "blind prejudices of ignorance and superstition" are still holding the land in their clutches and impeding its development at every step. The French, therefore, must go slowly and seek earnestly to win the confidence of Mulai-el-Yusef and his people. They must prove to the inhabitants that they are not coming to take their land and property away, but that they are honestly desirous of assisting in the material development of the country and in procuring for the citizens the protection for life and property so sorely needed.

It must be "Morocco for the Moroccans" as far as possible; and the bitter and unreasoning hatred of foreigners and foreign ideas must be surmounted by fair treatment, an honest and straight-forward diplomacy, and a friendly, unselfish spirit. Europeans should be allowed to penetrate only gradually into the interior under careful governmental supervision; and no colonization by French or Spaniards should be permitted for some time to come. No interference with the religious or private life of the people should be attempted; and native institutions, customs and methods ought to be utilized and developed wherever

possible. When necessary, force may be employed with discretion; but it must always be used with a firm and just hand through the recognized government. The people should be made to feel that it is the Prince of the Faithful who compels his subjects to accept the inevitable, and not the foreigner. In ten or fifteen years time, with patience, tact and forbearance, the French will be ruling a new and reorganized Morocco; but it will be under a veiled suzerainty, as she is now managing Tunis, or as Great Britain controls Egypt. And the Moorish proverb: "He who stands long enough at the door is sure to enter at last," will once more have been fulfilled.

NORMAN DWIGHT HARRIS.

CANADA

COLONY TO KINGDOM

I suppose there is a stage in the development of the creature at which opinion may very well vary as to whether it is a tadpole or a full-fledged, or rather a four-footed, frog. Canada, constitutionally, is in a somewhat uncertain case; for, if you say that she is a colony, you will be confronted with some well-developed legs, and if you say that she is an independent state, you will be asked to explain away the remains of the tail. What sort of compromising language a biologist would apply to his dubiosity, I do not know; but, with reference to Canada, I am prepared to make a distinction, — to say that she is nominally a colony, and really an independent state. A veritable bit of the actual tail is still visible; there may not, indeed, be enough for performance of its former function of control, but quite enough to betray the origin of the animal; while the legs can very clearly kick, if not speak, for themselves. Nominally, I say, Canada is a colony; the forms, the nomenclature, the legal appearance still exist. But in reality Canada is independent and governs herself. A short summary of Canadian political history will establish that point.

Resemblance to British History. A sketch of the constitutional development of the United Kingdom itself will, with a few explanations, suffice for the main features of the development of the Canadian constitution. Observe the following parallelisms:

1. The principal agency in British evolution was the Common's control of taxation. So also in Canada.
2. In earlier years this control was not completely effective because of the existence of the hereditary revenues of the crown, and the King's frequent recourse to aids, benevolences, prizes, etc. So also, as to the revenues, in Canada — for example, all the moneys derived from the sale and leasing of lands (the lands all belonged to the King, we were told); all fines; all fees of office (most of the officials received fees); and

all customs duties levied by Imperial statute. These revenues were large, and some of the governors looked forward with joy to the time when they would be sufficient to defray all expenditure and thus end forever the absurdity of bothering with legislative assemblies.

3. In earlier times the kings had large legislative authority, and the Stuarts claimed divine right to do as they liked. Defeated in many constitutional contests and finally in civil war, all such claims were withdrawn and ended. So also in Canada, where the same sort of contests, resulting in civil, although unsuccessful, war, preceded the concession of responsible government (1847).

4. In earlier times, the King was the chief executive officer, and took advice when and how he liked. So also his deputy in Canada.

5. Imperceptibly, executive functions became attached to various departments presided over by members of the administration of the day. So also in Canada.

6. Gradually the King ceased to attend council meetings of the administration, and finally withdrew altogether. So also in Canada.

7. The most marked advance in this last respect occurred on the accession of George I. Not only could he not speak English and his councillors not speak Dutch, but, apart from his desire for the use of British soldiers and sailors to help him in his seizure of Swedish territory, he did not care very much what his ministers did. So also in Canada. After British adoption of free trade and free navigation (1846-9), there were few matters in which the governors were specially interested. They guarded British interests only, even as George I watched over those of Hanover.

8. In earlier days, treaties were one of the peculiar prerogatives of the Crown. Nominally, they are so still, but, in reality, control has passed to the cabinet. So in Canada. Nominally, Canada has no foreign relations, but in reality she regulates them, very largely, as she wishes.

9. Even the influences which in England made so dilatory and sluggish the progress of political evolution were duplicated in Canada. There were the same placemen and place-seekers; the same sycophants and parasites; the same society-climbers and flatterers; the same strivers for titles and favors; the same grovellers, weaklings and imbeciles. But

besides all these, there were always very many estimable men, splendid men, who fought against reform because they did not like it; because they believed it low, vulgar and democratic; because they believed that government by the people would mean spoliation and anarchy; because of their assurance that the classes ought to govern and the masses to do as they were told.

The parallelism is close. Substitute the Colonial Secretary in Canadian history for the Sovereign in British, and it is fairly complete.

Present Position. Explanation of the present position will be assisted by dividing into two categories the authority which, in the course of time, has passed from the Imperial and become vested in the Canadian Parliament, namely, (1) that relating to local and purely internal affairs, and (2) that relating to matters having an external aspect.

Internal Affairs. Tight check upon even trifling details of our government was maintained until the union of the two Canadas in 1840. We had legislative assemblies, but the governors had the greater power. Our rebellions (1837-8) produced Lord Durham's report (1839). Lord Durham's report led to the introduction of responsible government, to which Lord Elgin afterwards (1847) gave practical operation. And British adoption of the principles of free trade (1846) by removing the only reason for interference in our domestic affairs, relieved us from a good deal of the parentalism which we had theretofore experienced and resented. After that, little tiffs from time to time with our governors were necessary. Every one of these men had to suffer a little clipping of the wings; one wanted to control the pardoning power in criminal cases; another wanted to exercise a sort of veto over provincial legislation; another imagined that he ought to control our militia, and so on. None of them got what he wanted, and in later years, although still apt to chafe and fret a little,¹ they have almost completely settled down into recognition of their limitations. Indeed, we may say that, with reference to all purely domestic matters, our independence of control is not only absolute, but is unreservedly admitted and acknowledged by the Imperial authorities.

External Aspects. Interference in our domestic affairs ceased, not

¹ The above has no reference, and, as far as I know, no application to His Royal Highness the Duke of Connaught.

out of deference to colonial sentiment and aspirations, but because, as Mr. Gladstone once said — when the British Government really came to consider the matter, they found that they had no interest in such matters.

In other respects, in relation to subjects with regard to which certain sections of the British people continued to consider themselves entitled to privileges in their colonies, there were the same old objections to our freedom of action, the same old Downing Street pressure and interventions. We have not quite finished with some of them yet. What has been done and what remains to be done may be seen from the following review under the headings (1) Judicial Appeals; (2) Tariffs; (3) Copyright; (4) Naturalization; (5) Merchant shipping; (6) Treaties; (7) War. The first two are settled. The third is practically settled. The fourth and fifth are under discussion. The sixth is settled. The seventh—we shall see.

Judicial Appeals. Our final court of appeal is the Judicial Committee of the British Privy Council. Originally, colonies had no option in the matter,—their charters so stipulated. Now the system continues in partial operation because Canada has not chosen wholly to abolish it. Nominally we have no control. Nominally the King may bring all judicial matters to “the foot of the throne,” and do with them there as he thinks right. Really the King does nothing of the kind. Really our legislatures pass statutes, from time to time, assuming to limit the sovereign’s authority. Really we do as we like, and the sovereign assents to any legislation we choose to pass.

Tariffs. The advent of free-trade in the United Kingdom ended the prohibitions theretofore imposed upon us, and we commenced (1859) the regulation of our own tariffs. Naturally enough, the British manufacturer did not like our methods, and the Colonial Office intervened and threatened to disallow our statute. The threat brought a plucky reply from the Canadian Government:

Self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. It is, therefore, the duty of the present government distinctly to affirm the right of the Canadian legislature to adjust the taxation of the people in the way they deem best, even if it should unfortunately happen to

meet the disapproval of the Imperial Ministry. Her Majesty cannot be advised to disallow such acts, unless her advisers are prepared to assume the administration of the affairs of the colony, irrespective of the views of its inhabitants.²

That ended the merely domestic side of the tariff question, but several points still remained: (1) Preferential tariffs—treating one country one way and another in another way, (a) as between different parts of the King's dominions, and (b) as between those parts and foreign countries. (2) The obligation of treaties (a) past and (b) future.

Preferential Tariffs. As early as 1885, Canada had been proposing reciprocally preferential arrangements within the King's dominions, and in 1894 she arranged for a meeting in Ottawa to consider that and other questions. Favorable resolutions were passed, but they met with no sympathy in England. We were told, in an official despatch of 28 June, 1895, that "the guardianship of the common interests of the Empire rests" with the British Government; that "in the performance of this duty it may sometimes be necessary to require apparent sacrifices on the part of a colony * * * that they will not, without good reason, place difficulties in the way of any arrangements which a colony may regard as likely to be beneficial to it"; that this would have to be done, and that that would have to be observed. Only twenty-seven years ago! Canada worried a little, and appeared to be able to do nothing. The principal difficulty was the existence of two old treaties which prevented the colonies charging lower duties on the productions of the United Kingdom than on those of Germany and Belgium. Canada asked that the treaties might be denounced. The United Kingdom said no. It would be bad for us, and subversive of correct principle. Then Canada took a peculiar step. She passed a statute offering the United Kingdom a preference (1897; 60 Vic. c. 16, s. 17) and asked what was going to be done about it. Shortly afterwards, the Colonial Conference of 1897 applied further pressure and Lord Salisbury denounced the treaties. Preference has become a familiar feature of colonial legislation. There are some other treaties yet, but none of great importance. The British Government is at the present moment endeavoring to arrange our release from them.

² Can. Sess. Papers, 1860, No. 38.

Practically, now, we do as we wish. Special arrangements have been made with various countries and we make such terms with them as we please. If we had chosen to consummate the recent reciprocity arrangements with the United States, no one imagines that the United Kingdom would have thought itself entitled to interfere even though the United States was, as to a few items of our proposed tariff, placed in a better position than the United Kingdom itself. Our tariff independence is complete.

Copyright. Canada's dispute with the United Kingdom was the result of American methods and American legislation. Copyright could not be obtained by Canadians in the United States unless the type of the book was set there, whereas British law gave copyright throughout the whole of the King's dominions to everybody who published (that is, put on sale) the book in the United Kingdom before publishing elsewhere. The effect was specially detrimental to Canada. I have myself been obliged to print books in the United States in order to get copyright there, whereas an American prints at home and obtains copyright in Canada by sending a few copies to London. In 1888, and afterwards, we protested very vigorously. A bill is now passing the British Parliament giving us complete control.

Naturalization. British legislation provides for the naturalization of aliens while they are *within the United Kingdom* only. It professes to change nationality only so long as the recipient remains within those limits. Early Canadian legislation conferred complete naturalization, but in later times Canada has conformed her law to the British model. She gives naturalization within Canada only.

The United Kingdom has now under consideration a proposal to widen the effect of her statute, and the position of Canada and the other Dominions has come under consideration. The United Kingdom contends that colonial legislation is necessarily limited to the colony's own territory, and that Canada, therefore, cannot confer nationality which would be valid beyond its boundaries. Canada contends that her authority is complete. Limitation of her legislative control to her own territory, she says, is a restriction from which no sovereignty is exempt. She asserts no extra-territorial validity to her laws. Conferring status (that is all that takes place) has no appearance of extra-territorial legis-

lation. Naturalization gives a status just as does marriage and incorporation of companies. Foreign nations recognize the status or not as they please. Canada further contends that her Constitution gives her complete control of the subject of "Naturalization and Aliens." Canada will, of course, win in the long run. There is but one and the same solution of all such questions.

Merchant Shipping. This is the only matter of any importance, apart from those involving foreign relations, about which there is any difficulty, and it promises a few years more controversy before it, too, ends in the same old happy way. Originally British law applied to all ships flying the British flag. Then a distinction among those ships was introduced by permitting registration of ships in the colonies, and the colonies were authorized to legislate with reference to those ships. It was recognized too and permitted that the colonies should have control, subject to certain limitations, of ships (any ships) engaged in their coastal trade. Afterwards special constitutions were granted to Canada (1867) and Australia (1900). And now two points are being discussed: (1) Have the Dominions authority to control by their legislation all ships within their waters? and (2) If not, is such authority to be accorded to them?

The questions arose in connection with attempts by Australia and New Zealand to regulate the rates of wages, the equipment, the sanitary arrangements of all ships engaging in their trade. British and foreign vessels employ cheap labor. Lascars get less than ten cents a day, and the accommodation for the men upon some of the ships is in proportion to the wages. Australia and New Zealand insist that their own ships shall pay proper wages and be properly equipped; and the result is that their own ships are beaten out of their own trade by inability to compete with ships careless of the well-being of their men.

The British Government agrees that the colonies may regulate their own ships and also all ships doing coasting-trade, but they object to regulation of ships trading between one colonial port and any outside place. Objection is put chiefly upon the ground that the proposed legislation would be equivalent to exclusion of British and foreign ships; that British ships ought not to be excluded; and that if foreign ships were excluded, foreign countries would retaliate not merely against

colonial shipping but against British ships also. The British Government points out, moreover, that the existence of many foreign treaties debars the possibility of legislation along the proposed lines.

The colonies, at the last Imperial Conference (1911), made replies to these objections, and they adopted two resolutions, one requiring such modification of the treaties as would relieve the colonies from the contracted limitation of their authority (some of the treaties have already been got rid of), and the other in the following language:

That the self-governing oversea dominions have now reached a stage of development when they should be entrusted with wider legislative powers in respect to British and foreign shipping.

The British Government assented to the first, but opposed the second, of these resolutions.

Treaties. Originally the United Kingdom made such treaties (binding upon the colonies) as it pleased, and in doing so paid little regard to the interests of the oversea possessions. For example, when, as above mentioned, the colonies came to object to the Belgian and German treaties (made as late as 1862 and 1865 respectively), Lord Salisbury said:

With respect to these two unlucky treaties that were made by Lord Palmerston's government some thirty years ago, I am sure the matter of the relation of our colonies could not have been fully considered. We have tried to find out from official records what species of reasoning it was that induced the statesmen of that day to sign such very unfortunate pledges; but I do not think they had any notion that they were signing any pledges at all. I have not been able to discover that they at all realized the importance of the engagements upon which they were entering.

In 1878, we obtained a declaration from the British Government that, for the future, no commercial treaty would be made by which Canada should be bound, unless she herself assented to it.³ The German and Belgian treaties had been made before that date. They are now gone, and we are free from any future commercial treaty obligations other than those of our own making.

And we do make them. In 1879, we wanted to enter into some tariff arrangements with Spain, but having to act through the British Foreign

³ British Blue Book, Commercial, No. 5, 1903; Can. Sess. Pap., No. 24, p. 7.

Office, negotiations were difficult, and our commissioner, Sir A. T. Galt, said (as afterwards summarized by Sir Charles Tupper): "that he found himself greatly hampered in discharging the duties imposed upon him by the Government of Canada, because he only stood in the position of a commercial commissioner, and it was necessary that all his negotiations with the Government of Spain, should be filtered through Her Majesty's Minister at the Court of Madrid."⁴

In 1893, our commissioner to negotiate trade arrangements with France, Sir Charles Tupper, was associated with the British Ambassador at Paris, and *Sir Charles did the work.*

In 1897, further arrangements were made with France, and on this occasion the part taken by the British authorities was purely formal. With reference to it Sir Wilfrid Laurier afterwards said:

It has long been the desire, if I mistake not, of the Canadian people that we should be entrusted with the negotiation of our own treaties, especially in regard to commerce. Well, this looked-for reform has come to be a living reality. Without revolution, without any breaking of the old traditions, without any impairment of our allegiance, the time has come when Canadian interests are entrusted to Canadians, and just within the last week, a treaty has been concluded with France—a treaty which appeals to Canadians alone, and which has been negotiated by Canadians alone.⁵

In 1909, Canada created a Department of External Affairs, and the statute (8, 9, Ed. VII, c. 13) expressly refers to negotiations with foreign countries:

The Secretary of State * * * shall have the conduct of all official communications between the government of Canada, and the government of *any other country in connection with the external affairs of Canada*, and shall be charged with such other duties as may from time to time be assigned to the department by order of the Governor in Council in relation to such external affairs, or to the conduct and management of international or intercolonial negotiations, so far as they may appertain to the government of Canada.

In 1910, a treaty was arranged between the United Kingdom and the United States providing for the general arbitration of differences

⁴ Hans., May 12, 1887, p. 396; and see Canadian Sessional Papers, 1894, No. 56A, p. 98.

⁵ Quoted, Hans., 1907, 8, p. 1260.

between Canada and the United States, by proceedings with which the British authorities have nothing to do, by direct communication, namely, between Canada and the United States. In this respect, the treaty is really equivalent to a transfer from the British Foreign Office to the Canadian Government of the conduct of external relations with the only foreign country with which Canada has large and delicate relations. Article 10 of the treaty is as follows:

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two Parties, it being understood that on the part of the United States, any such action will be by and with the consent of the Senate, and on the part of His Majesty's Government, with the consent of the Governor-in-Council. In each case so referred, the said Commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred.

If the said Commission is equally divided or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the High Contracting Parties to an umpire chosen in accordance with the procedure prescribed in the fourth, fifth and sixth paragraphs of Article XLV of the Hague Convention for the pacific settlement of international disputes, dated October 18, 1907. Such umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission failed to agree.

When we remember that in 1892 the British Foreign Office declared that "To give the colonies the power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate states, and would be equivalent to breaking up the Empire into a number of independent

states," we are able to realize the import of our present arrangements with the United States.

War. The relation between Canada and the United Kingdom with reference to war, divided, with the question of reciprocity with the United States, the attention of the electors at our last general elections (21 September, 1911). Popular vote ended reciprocity, and the war question is now, and will for some time be, the chief subject for political discussion.

The relations between the United Kingdom and the colonies prior to 1902, were stated in a memorandum presented to the Colonial Conference of that year by the War Office, as follows:

Prior to the outbreak of the war in South Africa, so far as any general scheme for the defence of the Empire as a whole had been considered, it was assumed that the military responsibilities of our great self-governing colonies were limited to local defence, and that the entire burden of furnishing re-enforcements to any portion of the empire against which a hostile attack in force might be directed must fall on the regular army. There may possibly have been some pious hope that in time of need the colonies might rally to the mother country, but no definite arrangements were made, nor were inquiries even on foot as to whether such aid might be expected, and if so, in what strength. Indeed, the necessity for it was by no means realized and its reliability was doubted.⁶

Before that date, Australia and New Zealand had made an arrangement with the British Admiralty whereby certain payments were to be made by the colonies, and certain naval defence provided by the Admiralty, and at the conference of that year, all the other self-governing Dominions, except Canada, agreed to send annual money contributions. Canada declined upon the ground of the inconsistency of the proceeding with the principles of self-government.

At the same conference, the British Government asked that, "The great self-governing colonies may be able to give some assurance as to the strength of the contingents which they should be able to place at the disposal of His Majesty's government for extra colonial service in a war with a European Power."

But the colonies declined to pledge themselves, and Canada and Australia said that the matter would be considered "when the need arose."

⁶ Colonial Conference, 1902, pp. 47, 48

At the next conference (1907), Canada had the satisfaction of finding that, not only had the British Government been converted to her view, but that the experience of some of the other colonies had proved its soundness. The Prime Minister, Mr. Campbell-Bannerman, in his opening speech, said that he did not (as Mr. Chamberlain always had done), ask for money, for he recognized that "the cost of naval defence and the responsibility for the conduct of foreign affairs hang together. * * * You in common with us are representatives of self-governing communities."⁷

Afterwards, Canada and Australia commenced the establishment of navies of their own, and the question of their employment in British wars necessarily arose. The legislation of both the colonies was absolutely non-committal; the executives were given authority, at their discretion, to hand over the ships. The British Government made no claim. On the contrary, it readily agreed that "the naval services and forces of the Dominions of Canada and Australia will be exclusively under the control of their respective governments."⁸

In the Province of Quebec a new political party, the Nationalist party, has been formed for the purpose of protesting against Canadian obligation to take part in British wars in the absence of representation in British councils. The Conservative party accepted that principle and united with the Nationalists in the formation of the present government. The Liberal party has always declared Canada's complete freedom of action; and, therefore, it may now be said that Canada is fairly unanimous in her assertion that there can be no obligation without representation. Our Prime Minister has indicated that an endeavor will be made to come to some agreement upon that basis with the British Government, and it is a part of his declared policy that no permanent arrangement will be finally made without having been first submitted for ratification to the people of Canada at a general election.

The situation is, therefore, not only very interesting, but extremely delicate. It looks as though the last trace of our tadpole tail were rapidly disappearing.

Parliamentary Control. In the Canadian Constitution are the following paragraphs:

⁷ Proceedings, p. 5.

⁸ Cd. 5745-2, p. 1.

55. Where a bill passed by the Houses of Parliament is presented to the Governor General for the Queen's assent, he shall declare according to his discretion, but subject to the provisions of this act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the Queen's pleasure.

56. Where the Governor General assents to a bill in the Queen's name, he shall, by the first convenient opportunity, send an authentic copy of the act to one of Her Majesty's principal Secretaries of State, and if the Queen in Council, within two years of receipt thereof by the Secretary of State, thinks fit to disallow the act, such disallowance (with a certificate of the Secretary of State of the day on which the act was received by him) being signified by the Governor General, by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the act from and after the day of such signification.

57. A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until, within two years from the day on which it was presented to the Governor General for the Queen's assent, the Governor signifies by speech or message to each of the Houses of Parliament, or by proclamation, that it has received the assent of the Queen in Council.

Those clauses are in the Constitution, but the understanding is fairly complete that they must not be acted upon. The last occasion upon which they were brought into operation was in 1888, when a bill respecting copyright was reserved by the Governor and remained unassented to. Canada had a grievance, as already stated, against the United States and wanted to retaliate. We were not permitted to do so. Our freedom is now conceded, and we shall very shortly do as we have been done by. The disallowance clauses of our Constitution are out of date.

A Canadian Flag. Our federation was formed in 1867, and shortly afterwards our government adapted the red ensign of the British mercantile marine to our purposes as a Canadian flag, by placing upon the fly of the flag the Canadian coat-of-arms. The Admiralty at first made no objection to the practice. On the contrary, a notification was sent by its Board to the Colonial Office, May 22, 1874, to the effect that "no objection would be raised to any vessel registered as belonging to one of her Majesty's colonies flying the red ensign with the badge of the colony in the fly."

The Admiralty soon changed its mind, and on the 25th of July of the following year intimated to the Colonial Secretary that the only proper

flag for the colonial mercantile marine was "the ensign without any badge."

Canadian ship-owners took little notice of this inhibition, and finally an Imperial statute⁹ was passed to put us straight:

1. The red ensign usually worn by merchant ships without any defacement or modification whatsoever, is hereby declared to be the proper national colors for all ships and boats belonging to any subject of Her Majesty, except in the case of Her Majesty's ships or boats, or in the case of any other ship or boat, for the time being, allowed to wear any other national colors in pursuance of a warrant from Her Majesty or from the Admiralty.

Canada was notified of the passing of this statute, October 3, 1889, and at the same time was informed that there would "be no objection to colonial merchant vessels carrying distinguishing flags with the badge of the colony thereon, in addition to the red ensign."

That was not, however, what Canada wanted, and an application was made, June 30, 1890, under the provisions of the statute, "for the issue of a general warrant which will permit Canadian registered ships to fly the red ensign usually worn by merchant ships with the Canadian coat-of-arms."

Objection being made, the Canadian Government passed an Order-in-Council, October 31, 1890, in support of the previous application, and Sir Charles Tupper wrote to the Governor-General, Lord Stanley, on November 13, 1890, saying that: "Since about 1869 our ships have been encouraged by the Government of Canada to use the red ensign with the Canadian coat-of-arms in the fly. * * * These ships are in every quarter of the globe."

Afterwards, November 7, 1891, Vice-Admiral Watson, then stationed at Halifax, wrote to the Governor-General:

I have read with much interest the correspondence relating to the Canadian flag. It will certainly be a great pity if the Home Government insist on its abolition. As a matter of feeling and sentiment, I know for certain it will cause very great dissatisfaction in the colony, and I can see no good result from the enforcement of the order; but on the contrary, I think a change enforced might give rise to trouble and will certainly cause general ill-feeling. They are proud of their flag, and their pride, in my opinion, should be encouraged and not damped.

⁹ 52, 3 Vic., c. 73.

The Governor-General took the same view, and in writing to the Colonial Secretary, December 12, 1891, referred to the use of the red ensign with the Canadian badge as follows:

It has been one of the objects of the Dominion as of Imperial policy to emphasize the fact that, by confederation, Canada became not a mere assemblage of provinces, but one United Dominion, and, though no actual order has ever been issued, the Dominion Government has encouraged, by precept and example, the use on all public buildings throughout the Provinces of the red ensign with the Canadian badge in the fly.

Of course it may be replied that no restriction exists with respect to flags which may be hoisted on shore, but I submit that the flag is one which has come to be considered as the recognized flag of the Dominion, both ashore and afloat, and on sentimental grounds I think there is much to be said for its retention, as it expresses at once the unity of the several Provinces of the Dominion and the identity of their flag with the colors hoisted by the ships of the mother-country.

Lord Stanley added that the enforcement of the Admiralty order "would be attended with an amount of unpopularity very disproportionate to the occasion, and at a moment when it is more than usually important to foster rather to check an independent spirit in the Dominion which, combined with loyal sentiments toward the mother-country, I look upon as the only possible barrier to the annexationist feeling which is so strongly pressed upon us by persons acting in the interests of the United States."¹⁰

Thus urged, the Admiralty gave way, February 2, 1892, at the same time retaining its opinion that "there are not unimportant objections to interference with the simplicity and uniformity of national colors. Whatever is conceded to Canada will almost certainly be claimed by the other colonial governments."

The warrant issued by the Admiralty, February 2, 1892, is as follows:

We do therefore by virtue of the power and authority vested in us hereby warrant and authorize the red ensign of Her Majesty's fleet with the Canadian coat-of-arms in the fly, to be used on board vessels registered in the Dominions.

¹⁰ At the Dominion elections of 1891, the question of closer trade relations with the United States was the principal issue, the Liberals strongly advocating a policy of unrestricted reciprocity.

The Admiralty's warrant sufficiently established a Canadian flag on our mercantile marine, and as appears from the despatch above quoted, our government, without any special Imperial authority, adopted it as our flag ashore. It very appropriately symbolizes and expresses the Canadian constitutional position; for the union-jack, in the corner, indicates our political origin and present affiliation, while the Canadian coat-of-arms in the fly denotes the commencement of independent national life. Its equivocal character has its parallel and its explanation in the ambiguity of our political status. Were we, in fact as well as in theory, a part of the British Empire, we should of course fly the flag of the Empire alone—the union-jack, the symbol of our subordination. And were we, in theory as well as in fact, an independent nation, we should fly no flag which did not clearly express our status and our nationality.

The Canadian flag has been adopted for use upon the recently provided Canadian war-ships, an agreement with the British Government declaring that on the jack-staff of our vessels there shall fly "the distinctive flag of the Dominion."

Summary. What has been said may be shortly summarized as follows:

1. As to all internal affairs Canada is absolutely free from control. She is really an independent nation.

2. With reference to those questions which have more or less an external aspect—

(a) Canada has reduced, and may at any time terminate, the system of judicial appeals to the British Privy Council.

(b) Canada arranges her own fiscal tariffs, including the giving of preferences as she pleases.

(c) Canada controls the subject of copyright.

(d) The subject of naturalization is at the moment in dispute.

(e) With reference to merchant shipping, the authority of Canada over ships registered in Canada and ships engaged in her coasting trade, is admitted. Her authority over other ships touching her ports is under discussion.

(f) Canada arranges her tariff-treaties as she pleases. And she has with the United States an arrangement under which all matters of difference may be decided without reference to the British Government.

(g) Canada has asserted her liberty of action with reference to British wars. She has frequently, through her Prime Minister, declared that she will or will not take part in such wars as she may think proper. Both political parties in Canada have agreed that there can be no war-obligation on the part of Canada in the absence of her participation in the diplomacies which involve war.

JOHN S. EWART.

THE NECESSITY FOR AN INTERNATIONAL CODE OF ARBITRAL PROCEDURE¹

The Final Act of the Second Hague Conference "recommends to the parties the assembling of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding conference," and recommends the appointment of a "preparatory committee" which (in the language of the Final Act), shall be "charged by the governments with the task of collecting the various proposals to be submitted to the conference, and of ascertaining what subjects are ripe for embodiment in an international regulation," and of preparing a program for the conference and a plan for its organization and procedure. This recommendation, in the absence of some catastrophe, such, for instance, as the outbreak of a great European war, means the meeting of the Third Hague Conference some time in 1915, or thereabouts, and already many of the great nations of the world, among them the United States, have appointed their members on the preparatory committee.

One of the most important duties, if not the most important duty, of this committee, as we have seen, is the duty of "ascertaining what subjects are ripe for embodiment in an international regulation;" in other words, what portion of international law is now ripe for codification in the form of a convention to be adopted at The Hague. Ever since the days of the adoption of the Code Napoleon and of the beginning of Bentham's agitation for similar legislation in Great Britain, there has been a lively controversy as to the merits of codification in the abstract and a still livelier controversy as to the merits of any particular project of codification which has been suggested. As Professor Beale has pointed out,² the early codifiers appear to have had two main purposes: first,

¹ A paper read at the Third Annual Conference of the American Society for the Judicial Settlement of International Disputes, held at Washington, D. C., December 20 and 21, 1912.

² See "The Development of Jurisprudence during the past Century," by Professor Joseph H. Beale, an address delivered before the Congress on Arts and Sciences at

the unification, and, second, the simplification of the law. Codification, where adopted, appears to have succeeded in bringing about uniformity. For instance, in France and the other countries where it was adopted, the Code Napoleon was no respecter of persons or places. It made one law for all classes in all parts of the empire; and hence, undoubtedly, its popularity and permanency. As regards the other purpose, however, the simplification of the law, little has been accomplished. Bentham's idea was a law which should be so plain that not only he who runs may read, but he who reads may straightway understand without consulting his attorney; a law designed to so diminish litigation as to render unnecessary Jack Cade's somewhat harsher proposal, to hang all lawyers. This ideal has, of course, failed of realization. Professor Beale presents some interesting statistics to show that France and California, with codes, have more litigation than England and Massachusetts without them; and judge-made law (and, incidentally, lawyers), are just as prevalent in the former as in the latter jurisdictions.^{2a} In the unification of municipal law the codifiers have largely succeeded; in its simplification they have largely failed.

The real strength of the argument for the codification of international law in general appears to rest largely on the proposition that it is precisely unification that the law of nations needs.³ Just as it was desirable to harmonize and unify the laws of the Communes of France one hundred and twenty years ago, so it is now in the United States. St. Louis, Sept. 20, 1904, in the Division of Jurisprudence: reprinted in 18 *Harvard Law Review*, p. 271 at pp. 276-279.

^{2a} *Ibid.*

³ Senator Root, in his address on "The Function of Private Codification in International Law," delivered at the fifth annual meeting of the American Society of International Law, observed: "To codify municipal law is to state in systematic form the results of the law-making process already carried on by a nation through its established institutional forms. To codify international law is primarily to set in motion and promote the law-making process itself in the community of nations in which the institutional forms appropriate for the carrying on of such a process have been so vague, indistinct, uncertain, and irregular that they could hardly be said to exist at all." [Vol. V, AMERICAN JOURNAL OF INTERNATIONAL LAW, 1911, p. 577 at p. 579.] It is submitted that the distinction here drawn is applicable rather to some of the later instances of the codification of municipal law such as the recent codification of some branches of the law in England, where, as Professor Beale points out, the purpose "appears to be merely an artistic one" rather than to such codes as the Code Napoleon and the modern European codes, which have unified the laws of countries heretofore hampered by a medley of inconsistent local customs and laws.

dred years ago, as applied to the individual, it has become desirable, as fast as practicable, to harmonize and unify the various national conceptions of the law governing the conduct of nations toward one another, which we call "International Law"—and we have the experience of the past to show us that unification can be brought about through a code.

The unification of the law may, however, be purchased at too high a price. It is better that some things should not be settled until they can be settled right. And, in determining "what subjects are ripe for embodiment in an international regulation," *i. e.*, what topics of international law should be codified, the preparatory committee in each country will be compelled to decide, as to each subject, not only whether or not it is possible to reach an agreement with respect to the subject in question in an international assembly in which a small minority has, in practice, an absolute veto power, but also whether or not such an agreement, even if reached, would not be purchased at too great a cost, either to the country which it represents or to the proper development of international law in general. It is submitted that, in the case of most of the more important topics of substantive international law, the various preparatory committees will be obliged, for one or the other reason, to conclude that at present the time is not ripe for codification. But it is believed that there is one great branch of adjective international law, the matter of arbitral procedure, for which the time for codification is not only due but past due, and where codification has indeed become necessary for the best interests of the development of substantive international law.

So long as the great fundamental principles of procedure are kept in view, *i. e.*, those which secure to all parties concerned in an arbitration, at some time and in some way, an adequate hearing,—principles which are found in the municipal law of every civilized country,—it really makes comparatively little difference what particular methods of procedure are adopted. Here is a matter as to which it is not reasonable to suppose that uniformity will be secured by the surrender of any important right or principle by any nation. Here is a topic of the law which it is much more important to have settled than to have settled in any particular way.

Moreover, it is believed that, however it may be in the case of substantive law, matters of international procedure, owing to the peculiar nature of the circumstances, are more likely to be settled right by the Hague Conference than if they are settled from time to time by the rulings of the court itself. Not only does the Hague Court lack the continuity which it ought to have in order to build up satisfactory rules of practice, but points of practice are too often settled either by agreement of the agents or by the president of the tribunal *in camera*, sometimes without any opportunity at all for argument, and, often, after a merely informal discussion — a practice which I venture to think, with all deference, is unfortunate. Moreover, even if there is argument, the court does not generally get the benefit of the same kind of a presentation of the various viewpoints that it gets in matters of substantive law. The agents and counsel are, of course, primarily desirous to safeguard the interests they represent, and they are not ordinarily disposed to battle for what they conceive to be the right rule of practice when there is danger that they may, by so doing, seem to embarrass the court and, possibly, prejudice the interests confided to them. They are prone to compromise and defer to the convenience of the court and of the other party as regards all matters of procedure unless they appear likely to affect in a material way the particular case in hand. All this is unfavorable to the growth of a good code of procedure, whereas no difficulty is perceived in creating such a code at the next Hague Conference.

So far little of importance has been done in the matter of settling procedure in international arbitrations. Perhaps nothing illustrates more aptly the present chaotic conditions of practice and procedure in international arbitrations than the difference of opinion which prevails with respect to the functions of the documents constituting the pleadings.⁴ What should be the nature of the "cases, counter-cases, and, if necessary, of replies"⁵ provided for by the Hague Convention? And, especially, what should be the function of these pleadings when provision is made for either oral or written argument?

⁴ "L'instruction écrite," Article 63, Hague Convention (1907) for the Pacific Settlement of International Disputes.

⁵ "Mémoires des contre-mémoires et, au besoin, des répliques," Article 63, Hague Convention.

According to the practice of the United States, at least in recent years, the case and counter-case are to be regarded more or less as true pleadings, although expanded so as to give a complete, although succinct, statement of the facts relied on to establish the various contentions of the respective parties. The case states the facts as persuasively as possible, ordinarily in narrative form, points out the conclusions which it is conceived should be drawn from these facts, and is accompanied by documentary evidence which is relied upon to support the facts therein related, by way of appendix. The counter-case performs a similar function as regards the facts relied upon in answer to the case of the other party. But when, as in perhaps the majority of instances, case and counter-case are to be followed with either written or oral argument, or perhaps by both, it has not been the American practice to argue, or even, to any considerable extent, to marshal the law or the facts in the case or counter-case.⁶

⁶ See the case and counter-case of the United States in the following arbitrations: Bering Sea, with Great Britain, 1893; North Atlantic Coast Fisheries, with Great Britain, 1909-10; Alaska Boundary, with Great Britain, 1903; Orinoco Steamship Company matter, with Venezuela, 1909-10; Chamizal Arbitration with Mexico, 1910-11. See also, as essentially conforming to this practice, although under different names, the memorial and replication of the United States in the Pious Fund Arbitration with Mexico of 1902. The nature and function of case and counter-case were particularly discussed in the North Atlantic Coast Fisheries, Orinoco Steamship and Chamizal Arbitrations.

In the counter-case of the United States in the Fisheries Arbitration the agent of the United States, Mr. Chandler P. Anderson, after pointing out that the British case had indulged in argument, observed: "The view taken on the part of the United States as to the function and character of the printed Case and Counter-Case, required by Article VI of the Special Agreement, has been that the Case should present the evidence relied on in support of the position taken with respect to each question, and that the Counter-Case should deal with the evidence in reply to the Case of the other Party, postponing the presentation and discussion of questions of law and of the issues raised by the evidence until the printed and oral arguments. The Case of the United States was prepared in accordance with this view, and in the preparation and presentation of its Counter-Case the United States will follow the course indicated." [Counter-Case of the United States, North Atlantic Coast Fisheries Arbitration, p. 1.] See also Case of the United States, Orinoco Steamship Arbitration, p. 6, Counter-Case, *ibid.*, pp. 3 and 5; Case of the United States, Chamizal Arbitration, pp. 6 and 7; Counter-Case, *ibid.*, pp. 3 and 4.

Compare the parenthetical definition of "Case" given in Ralston's *International Arbitral Law and Procedure*, Section 273, which is as follows: "(By the term 'case'

Continental and Latin American practice, in which even the British occasionally join, is otherwise. The case and counter-case are made use of for argument as well as statement. The Continental method has the practical advantage when opposed to the American method, that under it the members of the tribunal take their places upon the bench fully acquainted with the strength of the side employing it, while the strength of the other side is as yet undeveloped. In other words, the Continental method secures the first favorable impression with the tribunal, which, as everyone knows, may be lasting. On the other hand, it has the practical disadvantage, at all times, that it is likely to result in the wasting of a great deal of ammunition in establishing contentions which are conceded and attacking positions which are undefended, and may result in compelling those who follow it to change their position during the course of the argument. It is submitted that the American method is more in accordance with the provisions of the protocol when these call for a case, counter-case and argument, and is more conducive to a logical and orderly presentation of the questions at issue.

But, in any event, it seems highly desirable that some definite understanding should be reached as to just what is the function of the "case" and "counter-case"—the "*mémoire*" and "*contremémoire*" of the Hague Conventions.⁷

Chapter III of the Hague Convention of 1907 which is entitled "Arbitral Procedure" consists of thirty-five articles, occupying about four octavo pages, but about half of these articles, on examination, will be found really not to relate to arbitral procedure in the strict sense of

is meant a full statement of the position of the party presenting it, with a summary of the law and facts, coupled with any fortifying exhibits.)"

Of course the observations in the text do not apply in cases, like the Alsop Case, United States and Chile, 1909–10, where the terms of the submission, after calling for a "case" and "counter-case," further provided that "The case shall then be closed unless His Britannic Majesty shall call for further documents, evidence, correspondence or arguments from either government." Of course, under this arrangement, it was necessary that both case and counter-case should be argumentative. A similar observation should be made with respect to the Venezuela Preferential Case of 1903, where the protocol provided for submission to The Hague without any provision as to the matter of pleadings, which were directed by the tribunal after it began its sessions. The entire circumstances of this case were also peculiar.

⁷ See AMERICAN JOURNAL OF INTERNATIONAL LAW, January 1911, pp. 55–56.

the word, but to refer to such related topics as the method of the constitution of the tribunal, the jurisdiction of the court as regards framing the *compromis* of arbitration, and so forth. And the articles which do relate to procedure will, upon examination, generally be found to relate to purely formal matters, rarely of any great practical importance, such as changing the place of meeting of the tribunal, the method of recording the proceedings, etc., or else to contain generalities more or less glittering, such, for instance, as that contained in Article 70, which secures to the agents and counsel for the parties the right "to present orally to the tribunal all the arguments they may consider expedient in the defense of their case." When it comes to the really vital matters of procedure the Hague Convention chapter has nothing more definite to offer than Article 74, which reads:

The tribunal is entitled to issue rules of procedure for the conduct of the case, to decide the forms, order, and time in which each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

It will be observed that this article, unless controlled by specific provisions in the protocol of submission, practically remits the parties as regards all matters of procedure to the discretion of the court.

It is true that a prior article, No. 52, provides for the signing, in each case, of a special *compromis* of arbitration, in which the issues in the arbitrations are to be defined and the dates and order of pleadings stipulated. The *compromis* may also specify the language to be used by the tribunal and contain such further stipulations as the parties are agreed upon. Theoretically, therefore, there is nothing to prevent the parties to each arbitration from inserting in the *compromis* a sufficiently detailed code of procedure: practically, of course, this is impossible. Every word in the terms of an arbitral *compromis* is carefully scrutinized by both sides. Each is seeking to secure terms which will be favorable to the presentation of its case and to prevent the other party from securing any undue advantage through the wording of the *compromis* . Very frequently, although the question to be arbitrated may have been under discussion for years, the terms of the *compromis* of arbitration are agreed upon in great haste, and, sometimes, as, for instance, in the case of the Casablanca *compromis* , under circumstances of great international

stress, when there is imminent danger of war. Under these circumstances it is idle to expect that any particular attention will be given to matters of procedure. The shorter the terms of the instrument the better chance there is to secure an agreement. The inevitable disposition of both parties is to secure an agreement of some sort, generally brief, often vague in terms, which will put the matter in train for arbitration, and then to turn the whole matter over to the court, with perhaps a paragraph incorporating Chapter III of the Hague Convention on procedure, so far as applicable, which, as we have seen, is to all intents and purposes simply appealing to the uncontrolled discretion of the tribunal.

It is submitted that this is a very unfortunate practice. As a result, when the parties actually face one another across the counsel-table at The Hague, everything is chaotic so far as procedure is concerned. About the only thing that can be counted upon with reasonable certainty is that the president of the tribunal will open the proceedings with a hopeful and inspiring address on the future of arbitration, direct the Secretary-General to announce the names of the agents and counsel of the parties, and adjourn the meeting. Then there will begin (if they have not already begun before the first formal sessions), a series of conferences *in camera* between the tribunal and the parties with a view to working out some sort of a practical scheme of procedure for the court.

Perhaps the first question that may arise is the question as to who is the plaintiff in the arbitral proceedings. It might be thought that this ought to have been determined at some earlier stage of the proceedings, but, very frequently, it has not been formally so determined, even in cases in which there can be no possible doubt as to which of the parties is really the plaintiff under any sane system of law. An examination of the protocols under which the various cases have been submitted to the Hague Court shows that in only one case, the first case submitted, the Pious Fund Case, has the protocol, by providing for a memorial to be filed first by one side, to be followed, after a stated interval, by an answer on the other, appeared clearly to recognize that one party was plaintiff and the other defendant.⁸ In all the other cases it was provided that

⁸ *Treaties and Conventions, etc., 1776-1909*, Vol. 1, p. 1194 at p. 1197.

the pleadings, *i. e.*, the cases, counter-cases, arguments, etc., should be filed simultaneously, although in certain cases, as, for instance, the Orinoco Steamship Case,⁹ the court has formally recognized during the course of the proceedings that one party was plaintiff and the other defendant.

One of the most interesting instances of the difference of opinion which can arise with respect to who is the plaintiff, after the parties reached The Hague, is furnished by the Venezuela Preferential Case, where the protocol merely provided for reference of the claim of the blockading Powers to preferential treatment to the Hague tribunal and fixed the date on which the tribunal should meet, without making any provision with respect to the filing of the cases, counter-cases and arguments.¹⁰

On the meeting of the tribunal, differences of opinion immediately arose as to matters of procedure, and, particularly, as to which were the parties plaintiff. A number of non-blockading Powers took the ground that, inasmuch as the blockading Powers were claiming "a real privilege contrary to the general law" they were plaintiffs, and should be called upon in the first place to make a statement of the grounds of their claim, which should be subsequently answered by the non-blockading Powers.¹¹ To which Mr. Cohen, for Great Britain, responded on behalf of the blockading Powers that "in this case no one party was plaintiff more than another."¹² And he urged that, "according to uniform precedent in cases of this kind," the cases, counter-cases, etc., should be exchanged simultaneously. Mr. Bunz, for Germany, supported Mr. Cohen's argument for simultaneous pleadings, but he added that "his government considered that the blockading Powers were undoubtedly defendants in this case, as being in the possession of the securities."¹³

Here we have the representatives of Belgium, France, The Netherlands, Spain, Sweden and Norway claiming that the blockading Powers, Great Britain, Germany and Italy were plaintiffs, the representative of Great Britain maintaining that no one party was plaintiff more than

⁹ See protocol of October 6, 1910, *Protocols de Seances*, etc., p. 36.

¹⁰ *Treaties and Conventions, etc., 1776-1909* Vol. II, p. 1872 at p. 1875.

¹¹ Protocol of Friday, October 2, 1903, *Recueil des Actes et Protocoles*, p. 39 at p. 41; *Report of William L. Penfield*, United States Agent, p. 55.

¹² *Ibid.*, p. 42; *ibid.*, p. 56.

¹³ *Ibid.*, p. 43; *ibid.*, p. 57.

another, and the representative of Germany claiming that the blockading Powers were defendants. The court, in the next session, without deciding which countries were plaintiffs or defendants, directed the simultaneous filing of pleadings.¹⁴

It is recognized that this matter of determining who is the plaintiff in an international proceeding touches certain fundamental problems growing out of the nature of sovereign states and their relations to one another, and that it may not be possible, at this stage of the development of international arbitration to frame a code which will satisfactorily determine who is the plaintiff in every international litigation. It is believed, however, that it would be possible to lay down certain general principles which should properly control, where applicable, in the absence of any agreement to the contrary in the arbitral *compromis*, and that these general principles would satisfactorily dispose of the great majority of cases. Even in cases where the code was not applicable as determining plaintiff or defendant, provision could be made for some simple and certain method of fixing the incidents of procedure normally dependent upon the question as to who is the plaintiff in the case, such, for instance, as the order of oral argument.¹⁵

¹⁴ *Ibid.*, p. 52; *ibid.*, p. 62. A similar discussion arose in the recent Chamizal Arbitration between the United States and Mexico before the International Boundary Commission, the United States arguing, on various grounds, among others possession of the territory in question on the part of the United States, that Mexico was plaintiff, and Mexico taking the position that both parties were on a perfect equality, that neither was plaintiff or defendant. In this case, as in the Venezuela Preferential Case, the immediate practical point to be decided, which was thought to depend upon the question as to which party was plaintiff in the case, was the question as to who should open the argument, in this case the oral argument. It was impossible for the court to avoid asking the representative of one or the other party to begin, and, accordingly, the Presiding Commissioner requested the representative of Mexico to proceed, although carefully guarding himself against having, by so doing, passed upon the question of principle whether either party was plaintiff or defendant. It should be noted that the Mexican agent rested his contention, to a great extent, on the fact that the terms of the submission called for simultaneous pleadings. [Mexican Counter-Case, p. 52; Oral Argument, p. 15: See United States Argument, p. 4, citing the customary usage in this sense.] Señor Casasús, the Mexican agent, further said in the oral discussion: "The question of who is the claimant must be decided at the end of the case, because there are very important consequences to be derived from that question."

¹⁵ Pending the adoption of such an international code of procedure as is here suggested, it is submitted that whenever it is possible for the parties to agree as to which

As it is, the whole matter as to the order of oral debate is still undetermined, although it was almost the first question which arose when the first Hague tribunal met to decide the Pious Fund Case.¹⁶ In that

is plaintiff or defendant, this should be recognized in the *compromis* of arbitration, at least to the extent of fixing the order of pleadings with that in view, *i. e.*, these should not be simultaneous, but with a memorial or case on one side, to be followed, after a sufficient interval, by the answer on the other, etc., as was done in the *compromis* for the submission of the Pious Fund case, which was, in this and many other respects, an admirable instrument.

¹⁶ The following is extracted from the record of the proceedings in the second session of the tribunal, Sept. 15, 1902. (The first session had been purely formal.)

"MR. RALSTON [Agent of the United States]. * * * Before presenting Senator Stewart, whom we will ask to make the first speech, with your permission, there is one question which has arisen between the Agent of Mexico and myself upon which I should be pleased to have the court pass, as it may determine the course of the arguments somewhat. According to English, I think, and I know to American, practice the complainant (*demandeur*, so to speak) has the right to open and to close the case; to make the opening argument and the closing argument. The defendant may, make two or three or more intervening arguments, or if there be a large number of counsel the counsel should arrange it in such manner that the closing speech is made on the part of the plaintiff (*demandeur*). I know that this practice is an absolutely uniform one. SIR EDWARD FRY. Not in England. MR. RALSTON. It is with us. I want to submit the question of the order of debate at this time to the decision of the court. M. LE PRÉSIDENT. Est-ce que vous demandez une décision du Tribunal sur cette question? MR. RALSTON. S'il vous plaît. M. LE PRÉSIDENT. Est-ce que l'agent des Etats-Unis mexicaine est d'accord? M. PARDO. La remarque faite par l'agent des Etats-Unis d'Amérique prouve ce que je m'étais permis d'indiquer dans un réunion préable de la Cour: la nécessité absolue de fixer la procédure à suivre. Le protocole n'a pas pu comprendre tous les détails de cette procédure; il faut absolument, pour éviter une discussion à chaque pas, que le Tribunal daigne fixer une bonne fois au moins les éléments d'une procédure régulière, autrement nous serons à chaque instant l'une et l'autre partie aux prises pour savoir combien de fois chacun des avocats peut parler, si les documents peuvent être produits pendant l'audience ou en dehors. Il faut je crois que le Tribunal daigne fixer une bonne fois la procédure qui doit être suivre devant elle, autrement le procès sera embrouillée d'une façon telle que nous entendrons jamais. J'adhère donc à la proposition de M. l'agent des Etats-Unis, et je demande au Tribunal de fixer une bonne fois la procédure à suivre devant lui." [See pp. 515-516 Ralston's Report, Appendix II Foreign Relations of the United States, 1902]. For decision of tribunal as stated in text, see, *ibid.*, p. 523. Subsequently each side was allowed two counsel in reply, p. 752: this rule was strictly enforced. Although the decision of the court had expressly reserved the right of counsel to reply to objections which particularly concerned matters which they had covered in the opening argument, objection was made when one of the counsel for the United States, at the beginning of his argument in rebuttal, asked permission to yield five minutes to Mr. Ralston, the American Agent. [*Ibid.*, p. 769.] Subsequently

case the pleadings, for all practical purposes, recognized the United States as plaintiff. The court decided that the United States should open the argument, using as many counsel as was desired; that, thereafter, each side should be heard in turn once more by one counsel. A subsequent modification of this ruling permitted two counsel on each side to be heard in the final argument. It will be observed that this arrangement gave the plaintiff the opening and the defendant the closing argument contrary to the general American practice.

In the second case, the Venezuela Preferential, in which eleven nations appeared at the bar of the court, in two groups, the court, as above noted, did not differentiate between plaintiffs and defendants, but called upon the representatives of the parties in the alphabetical order of the countries which they represented.¹⁷ The court heard as many counsel as desired to speak in the opening argument, but each nation was limited to one speaker in the reply. In the Japanese House Tax case and in the recent Canevaro case there were no oral arguments; in the Mascat case only one side desired to be heard orally; in the North Atlantic Coast Fisheries case the speakers as well as the sides alternated, but this appears to have been by agreement of the two agents.¹⁸ In the Casablanca and Savarkar cases the two parties alternated, but each side was represented only by an agent. In the Orinoco Steamship case the court issued an order as to oral argument substantially similar to that in the Pious Fund case.

It is submitted, therefore, that there is as yet no well defined rule as to the order of oral argument before the Hague Court. If there be any rule of practice deducible from the cases, it would seem to be that, once it is determined in some way who is to open, that side shall be permitted

the American Agent presented these points through Judge Penfield of counsel, who closed for the United States. [*Ibid.*, p. 818; see, also, p. 627.]

¹⁷ Session of October 5, 1903. *Recueil, etc.*, p. 66. *Penfield's Report*, p. 67. In response to a query, the court ruled that the alphabetical order was to be in English: it will be remembered that by the terms of the protocol English was specifically made the language of the tribunal in this case.

¹⁸ See letter of Dr. Lammesch, President of the Tribunal, to Chandler P. Anderson, Esq., Agent of the United States, Aug. 20, 1910, in which Dr. Lammesch says: "The order of procedure in this arbitration was proposed by the agents and counsel of both parties and was accepted by the tribunal as it had been proposed." [Oral Argument, original publication, p. 1430; Congressional edition, p. 2373.]

to open fully by as many counsel as it may desire to use, the other side then to reply in like manner, with a closing speech on each side in the same order, *i. e.*, under this arrangement, the side which opens does not close the argument.¹⁹

The three points so far dealt with, namely, the scope of the case, and counter-case, the question of determining who is plaintiff and the order of speaking, are illustrations of the many elementary, yet fundamental matters relating to practice and procedure with regard to which the Hague Conventions make no provision. It may be worth while to mention two other very practical matters which are touched on in the Hague Conventions, but as to which a satisfactory practice has not yet been established.

Articles 71 and 72 of the Hague Conventions secure, respectively, the right of agents and counsel to "raise objections and points" and the reciprocal right of the members of the tribunal to interrogate agents and

¹⁹ In the Chamizal Arbitration, however, the learned Presiding Commissioner observed that "The usual international practice, as I understand it, is that one counsel shall be heard on one side and another on the other side, and that they should alternate in that manner." [Chamizal, Oral Argument, p. 45; see, also, pp. 94, 97 and 99 for expressions to the same effect.] And, acting upon this view, he ruled that the argument in the Chamizal case should proceed in that order, which, it will be noted, was the order adopted, by agreement of the agents, in the North Atlantic Coast Fisheries case, but, it is believed, not followed in any other case at The Hague where there was more than one speaker on each side. The Presiding Commissioner in the Chamizal case further arranged that the order of the alternation should be changed in the closing speeches, thus giving Mexico both the opening and the closing, although the court expressly declined to hold either party plaintiff or defendant. It should be noted in this connection, however, that both parties had desired the other side to take the opening, and the Presiding Commissioner had requested Mexico to open. Very possibly it was thought that perfect equality would be obtained by giving Mexico the closing speech, which both parties desired; but, query, whether or not agent and counsel for the United States did not have a right to rely with some confidence on the uniform international practice, so far as the Hague Court is concerned at least, that the side which opens shall not be permitted to close, even though it be admittedly the plaintiff? As it turned out, the order of oral argument in this case was of no particular practical importance, but it is submitted that universal experience in the municipal courts has shown that in the long run it is a matter of great practical importance that the order of oral argument should be settled in advance by general rules which should be applied automatically to the particular case, at least in the absence of some peculiar circumstances calling for a departure from the general rule.

counsel. Both these rights might seem self-evident, even if not expressly recognized. Article 71 reads as follows:

They [the agents and counsel] are entitled to raise objections and points. The decisions of the tribunal on these points are final and cannot form the subject of any subsequent discussion.

It would seem that the right to raise objections and points, coupled with the prohibition of "subsequent discussion" of the decisions of the tribunal on these points would imply the right to make timely argument in support of an objection so raised before the interlocutory decision was handed down, especially in connection with the very sweeping right secured to agents and counsel by Article 70, already referred to, "to present orally to the tribunal all the arguments they may consider expedient in defense of their case."

Yet, in a recent case, an interlocutory motion having been made, no opportunity was given to argue the motion until the agent who made it obtained the floor in regular order to make his argument upon the merits. By that time it was too late to have given the relief asked for in the interlocutory motion, at least to its fullest extent, even if the court had been so minded. As it was the court did not notice the interlocutory motion in any way after it was argued.²⁰ The practical difficulties and embarrassments under which the court labored in this case are fully recognized, and it is not intended to suggest that the court failed to do substantial justice with respect to the subject of the motion, but it is submitted, in no spirit of captious criticism, that the time has now come when in matters of procedure as well as with respect to the merits of each case we should have done with arrangement and compromise and have clear-cut rulings upon points of practice as they are presented. And it is therefore suggested that if the court in this case correctly interpreted Article 71²¹ of the Hague Conventions, this article needs to be so amended

²⁰ See *AMERICAN JOURNAL OF INTERNATIONAL LAW*, January 1911, p. 57, for a fuller discussion of this incident. It is believed that under the peculiar circumstances of the case in question the interlocutory motion was seasonably presented. But if the court thought that it was not so presented it is submitted with deference that the proper course would have been for the court then and there to have declined to entertain it on that specific ground.

²¹ See the ruling of the tribunal, upon the basis of this article, in the Venezuela

as to secure to agents and counsel the right to make interlocutory motions at appropriate times, to have a reasonable opportunity to be heard thereon in open court, and to have a timely ruling upon the point as raised.

Article 72 reads as follows:

The members of the tribunal are entitled to put questions to the agents and counsel of the parties, and to ask them for explanations on doubtful points. Neither the questions put nor the remarks made by members of the tribunal in the course of the discussion, can be regarded as an expression of opinion by the tribunal in general, or by its members in particular.

Certainly there can be no question of the profit to be derived from free and informal colloquies between the court and counsel. Every intelligent counsel welcomes any reasonable inquiry from the bench, because it shows him the bent of the court's mind and gives him a fair opportunity to meet the difficulties which present themselves to the court. On the other hand, counsel have a right, which reasonable judges ought to be very careful to respect, to present their case in their own way without untimely or purposeless interruption. This right seems to be impliedly recognized in Article 70 of the Hague Conventions. In practice, however, it sometimes appears not to be sufficiently regarded.²²

This would seem to be too delicate a matter to attempt to regulate by express provision. But, again in no spirit of captious criticism, it is submitted that it is very desirable that the subject should be brought up and discussed, with a view to the formation of such a professional opinion among those likely to be participants, either on the bench or at the bar, in international litigation, as shall make for a sane and reasonable practice, which shall secure the benefits of the Socratic method without depriving agents and counsel of an opportunity, at some stage of the proceedings, to present their case in their own way.²³

Preferential case, calling counsel to order for attempting to reopen an interlocutory point once decided. *Recueil, etc.*, p. 54. *Penfield's Report*, p. 63.

²² One of the most extreme instances of this sort of thing on record was the interruption of Judge Penfield, counsel for the United States, while making his argument in the El Triunfo Arbitration with Salvador. The report of Judge Penfield's speech reads and looks like a drama in which the nominal speaker was only one of the *dramatis personaæ*. [See *Oral Argument of Judge Penfield, etc.*, G. P. O., 1902.]

²³ In the Casablanca arbitration the agents presented their arguments on one day, and were questioned on another day. This method is not without its advantages under some circumstances.

As has been said, the matters of procedure herein treated are elementary, but they are those which arise in almost every case brought before an international tribunal and they ought to be settled once for all by some definite rule, so that they should no longer trouble court and counsel. No attempt has been made in this paper to refer to more serious and more contentious matters of arbitral procedure, such as the law of evidence and the question of some adequate provision for reciprocal discovery, etc., matters as to which the Hague Conventions are wholly silent and which have received but scanty treatment in the various *compromis* of arbitration. But it is believed that enough has been said to illustrate the thesis which it is desired to present for consideration, which is, that, whatever other subjects the preparatory committee for the next Hague Conference may deem "ripe for embodiment in an international regulation," there is one branch of international law which is ripe for codification and which should be so reported to the conference by the preparatory committee, namely, the Law of International Arbitral Procedure.

WILLIAM CULLEN DENNIS.

RESTRICTIVE CLAUSES IN INTERNATIONAL ARBITRATION TREATIES

Until the great goal of the peace movement, that is to say, the world peace treaty without reservation of any kind and extending to all nations, shall at some future time have been concluded, two periods in the development of arbitration, each of which is in turn marked by three successive stages of growth, are clearly discernible. The first embraces the development of special treaties; the second that of the world treaty. In point of time, these two periods follow one another; yet the world treaty is ushered in even before the special treaty has reached its highest stage.

Special treaties and the world treaty alike pass through three stages of development. The first is characterized by the fact that the respective treaties are concluded at all, regardless of the extent to which the parties thereto bind themselves. In the second stage the effort is made to limit and to define more and more precisely the stipulations existing to a greater or lesser extent in the first. And in the third we reach at last the treaty without reservation.

As to the world treaty, we have as yet been unable to reach the first stage. In spite of the efforts to that end of many of the nations represented at the First and Second Hague Peace Conferences, it was impossible to overcome the opposition of the German Government. But it may nevertheless be considered certain that not many years will have passed before the hope for a world peace treaty is fulfilled.¹ I feel

¹ It is admirable to see with what steadfastness of purpose the German delegate, Philipp Zorn, professor in the university of Bonn, advocates the world arbitral treaty in Germany. Within the first five years following the Second Hague Conference, he has devoted not less than five addresses and articles to this problem, namely: (1) "Das völkerrechtliche Werk der beiden Haager Friedenskonferenzen," in *Zeitschrift für Politik*, 1909, pp. 321 *et seq.*; (2) "Zur neuesten Entwicklung des Völkerrechts," in *Festgabe für Güterbock*, 1910, pp. 197 *et seq.*; (3) "Das Deutsche Reich und die internationale Schiedsgerichtsbarkeit," address delivered as Rector Magnificus, 1911; (4) "Die Schiedsgerichtsbarkeit in dem Leben der Völker und im interna-

convinced that the less importance we attach to the point that the treaty is to effect the widest possible juridical subjugation, the sooner shall we obtain results. It is not at all important whether the world treaty, which may be concluded at one of the coming Peace Conferences, is composed of a few or many clauses. Our efforts would rather be directed to the end that such a treaty, however circumscribed as to form, shall be adopted. When we shall have made a beginning by concluding a world treaty providing for reference to arbitration of a few matters of secondary importance, its further development will quickly follow along intelligent and conservative lines. If, however, we demand at the very beginning, a world treaty under which controversies of the most difficult character shall be unreservedly referred to arbitration, we will run the danger of still further retarding progress. Better, therefore, to try and make some progress, however small, than none at all.

Though, in view of the present day conditions of the various states, a world treaty would be preferable to the many special treaties,² still the development of the special treaties is of great value to the juridical organization of the world. Since special treaties are, as it were, precursors of the world treaty, each step in advance in the system of special treaties will later on accrue to the benefit of the world treaty. And while we have not as yet a world treaty, we may, nevertheless, exert some influence upon the evolution of such a treaty by concluding special treaties composed of as few stipulations as possible and expressed in language that cannot possibly be misunderstood. But above all, it is of great importance that our efforts be exerted to remove gradually all differences existing in the special treaties; for, the more homogeneous and uniform the special treaties are, the more readily the states will subsequently be able to agree upon and evolve a world treaty.

If we cast a glance at the treaties which now embrace a large number of states, we cannot fail to see that we have not yet nearly reached the goal of a uniform, clearly expressed model, containing but few stipulations. It would be very difficult to establish a comparison between all

tionalen Recht," address delivered at the 19th annual session of the Interparliamentary Union, at Geneva, 1912; and (5) "Die internationale Schiedsgerichtsbarkeit," in *Handbuch der Politik*, Vol. II, 1912, pp. 798 *et seq.*

² Cf. Schücking, *Der Staate verband der Haager Konferenzen*, 1912, pp. 88 *et seq.*

arbitration treaties, because an authentic text of all has not up to the present time been published. In general, therefore, I limit myself to a survey of the arbitration treaties, published by the International Bureau³ of the Hague Arbitration Court, and of a few others whose tenor is of special interest. The comparison is not intended to include all the features of the treaties; it covers only their stipulations.

I. Treaties without reserves:⁴

- (1) Italy-Denmark, (2) Italy-The Netherlands, (3) The Netherlands-Denmark, (4) Denmark-Portugal, (5) Italy-Argentina, (6) Treaty between the Central American States, (7) Italy-Mexico.⁵

II. Treaties containing one exception:⁶

This concerns the exception regarding constitutional questions, and at the same time the practically meaningless restriction is made, excluding controversies which may be definitively settled between the parties.

- (1) Uruguay-Argentina, (2) Spain-Santo Domingo, (3) Spain-San Salvador, (4) Spain-Uruguay, (5) Spain-Bolivia, (6) Spain-Colombia, (7) Spain-Honduras, (8) Argentina-Paraguay, (9) Argentina-Chile, (10) Argentina-Spain, (11) Argentina-Bolivia, (12) Argentina-Brazil.

III. Treaties containing two exceptions:⁷

³ *Traité généraux d'arbitrage, communiqués au bureau international de la Cour permanente d'Arbitrage, première série, La Haye, 1911.*

⁴ As an illustration of such a treaty, we reproduce Article 1 of the treaty between Italy and Denmark, ratified May 22, 1906: "The high contracting parties pledge themselves to submit to the Permanent Court of Arbitration established at The Hague by the convention of July 29, 1899, all differences of whatever nature that might arise between them and which it might not be possible to settle through diplomatic channels, even in case these differences should arise from facts anterior to the conclusion of the present convention."

⁵ I have not been able to ascertain whether this treaty has been ratified.

⁶ Articles 1 and 2 of the treaty concluded between Spain and Uruguay, ratified November 21, 1902, declare: "The high contracting parties pledge themselves to submit to arbitration all controversies of whatever nature which for any reason might arise between them, provided that they do not affect the fundamental precepts of the Constitution of either the one or the other country and always provided they cannot be settled by direct negotiations." "In virtue of this convention, those questions which may have been the object of definitive settlement between the high parties cannot be reconsidered and changed. In such case, arbitration shall be exclusively confined to questions arising in regard to the validity, interpretation and execution of the said settlements."

⁷ Article 1 of the treaty ratified between Denmark and Spain, May 19, 1906, is

a. Reservations concerning the independence and integrity of the territory:

(1) Denmark-Norway, (2) Italy-Norway.

b. Reservations concerning independence and autonomy:

The Netherlands-Portugal.

c. Reservations concerning independence and national honor:

(1) Italy-Peru, (2) Mexico-Argentina-Bolivia-Paraguay-Peru-Santo Domingo-San Salvador-Guatemala-Uruguay, (3) Mexico-Spain, (4) Spain-Guatemala.

d. Reservations concerning independence and vital interests:

(1) Denmark-Spain, (2) Spain-Sweden-Norway.

IV. Treaties containing three exceptions:⁸

a. Reservations of independence, vital interests and sovereignty:

(1) Russia-Sweden-Norway, (2) Denmark-Russia.

b. Reservations of independence, vital interests, and integrity of territory:

(1) Sweden-Norway, (2) Denmark-Sweden.

c. Reservations of independence, vital interests and rights of third states:

Belgium-Denmark.

V. Treaties having four exceptions:⁹

an example: "The high contracting parties pledge themselves to refer to the Permanent Court of Arbitration established at The Hague by the convention of July 29, 1899, the differences which might arise between them and which it might not have been possible to settle through diplomatic channels; provided, however, that they do not concern either the vital interests or the independence of the respective countries."

⁸ For example, we quote Articles 1 and 3 of the treaty concluded between Belgium and Denmark: "The high contracting parties pledge themselves to submit to the Permanent Court of Arbitration established at The Hague by the convention of July 29, 1899, all differences that might arise between them in the cases enumerated in Article 3, provided they do not concern either the vital interests or the independence of the contracting countries, and provided an amicable settlement shall not have been reached through direct diplomatic negotiations, or any other conciliatory agencies." "Arbitration shall be obligatory between the high contracting parties: (1) With the reservations indicated in Article 1, in case of disagreement concerning the application or the interpretation of all conventions already or to be concluded between them, excepting those in which third Powers might be concerned or to which they might have adhered. * * *"

⁹ In illustration, we cite Article 1 of the Anglo-American arbitration treaty, ratified June 4, 1908: "Differences which may arise of a legal nature or relating to the in-

a. Reservations of independence, vital interests, national honor, and interests of third states:

(1) America-Italy, (2) Italy-France, (3) Italy-England, (4) Italy-Switzerland, (5) Italy-Portugal, (6) France-The Netherlands, (7) Spain-France, (8) Spain-England, (9) France-England, (10) Spain-Portugal, (11) France-Sweden, (12) France-Norway, (13) Germany-England, (14) England-Sweden, (15) England-Norway, (16) England-Switzerland, (17) England-Portugal, (18) France-Switzerland, (19) England-The Netherlands, (20) Portugal-Sweden-Norway, (21) Portugal-Switzerland, (22) Denmark-France, (23) Denmark-England, (24) Austria-Portugal, (25) France-Portugal, (26) Spain-Switzerland, (27) America-France, (28) America-Switzerland, (29) America-Mexico, (30) America-England, (31) America-Norway, (32) America-Portugal, (33) America-Spain, (34) America-Sweden, (35) America-The Netherlands, (36) America-Japan, (37) America-Denmark, (38) America-China, (39) America-Peru, (40) Norway-Portugal, (41) France-Colombia, (42) America-Salvador, (43) England-Colombia, (44) America-Haiti, (45) America-Ecuador, (46) America-Bolivia, (47) America-Costa Rica, (48) America-Austria-Hungary, (49) America-Paraguay, (50) Portugal-Brazil, (51) England-Brazil, (52) Portugal-Nicaragua, (53) China-Brazil, (54) Portugal-Argentina, (55) Austria-Hungary-England.

b. Reservations of independence, national honor, sovereignty and interests of third states:

(1) Belgium-Switzerland, (2) Belgium-Spain, (3) Belgium-Nicaragua.

c. Reservations of independence, vital interests, sovereignty and interests of third states:

(1) Belgium-Greece, (2) Belgium-Sweden-Norway, (3) Switzerland-Sweden-Norway.

d. Reservations of independence, vital interests, integrity of territory and national honor:

interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties."

Bolivia-Brazil.

VI. Treaties containing five exceptions:¹⁰

Reservations of independence, vital interests, national honor, sovereignty, and interests of third states:

(1) Russia-Spain, (2) Belgium-Russia, (3) Belgium-Roumania, (4) Greece-Spain.

To my knowledge there are no treaties containing more than five exceptions. It is to be noted especially that, even as classified above, the treaties still show great dissimilarities, as, for example, in case of the absence of express stipulation to the contrary, some of the treaties submit to arbitration all questions, and some only certain questions, particularly those of a purely legal nature, while in some exceptional treaties, cases are mentioned to which the exceptions may not be applied.

In consequence, we find that, in the matter of reservations, the treaties still show at least fifteen different combinations. It is evidently the office of the science of international law to prepare for the future, as far as possible, a fusion and diminution of exceptions. In the attempt to draw guide-lines for that purpose, we must clearly distinguish between what is now, and what may be possible of accomplishment in a more or less distant future.

At present we find still eight different kinds of exceptions in arbitration treaties, namely, those dealing with the constitution, national honor, vital interests, independence, integrity of territory, autonomy, sovereignty, and rights of third states. Even now, according to my judgment, the states might agree, in case they should not prefer a still more limited formula, to confine themselves in their treaties to the stipulations of "national honor and vital interests."

¹⁰ As an example of such treaties, we quote Articles 1 and 3 of the arbitration treaty between Greece and Spain, ratified March 11/24, 1910: "The high contracting parties engage themselves to submit to the Permanent Court of Arbitration, established at The Hague by the convention of July 29, 1899, the differences which might arise between them, in the cases enumerated in Article 3, provided they concern neither the honor nor the vital interests, the independence nor the sovereignty of the contracting countries. * * * " "With the reservations specified in Article 1, arbitration shall be obligatory between the high contracting parties: (1) In case of disagreement concerning the application or the interpretation of all conventions already concluded or to be concluded between them, excepting those in which third Powers have participated or to which they have adhered. * * *"

With special reference to the reservation regarding the interests of third states, Nippold¹¹ has justly pointed to the fact, that this reservation is so self-evident that it might as well be omitted from all arbitral treaties. That two states, in a controversy touching upon the rights of third states, should, without the latter's consent submit that controversy to arbitral decision, is a proposition that can certainly not be entertained. But, if the third state assents to the proposition, then there is not the slightest obstacle in the way of an arbitral settlement.

In reference to the constitutional reservation, it should fully suffice to exclude from arbitral settlement only such constitutional questions as relate to vital interests. And in such cases, the constitutional reservation would be included within that of vital interests.

With reference to the exceptions of independence, integrity of territory, autonomy and sovereignty, it is quite evident that they, one and all, present questions of vital interests, and that it is quite unnecessary to set them forth separately along with the reservation of vital interests. When, therefore, special treaties include at the same time stipulations concerning vital interests, independence, integrity of territory or others of like nature, such treaties, in my judgment, have little of an ideal character.

It would, therefore, not be a bad plan, if the states which generally include three, four or five exceptions in their arbitration treaties, should henceforth restrict themselves to those of national honor and vital interests. So far as I know, it is very remarkable that there is not a single arbitration treaty containing these two stipulations only, although the Russian proposition regarding obligatory arbitration, presented at the First Hague Conference, dealt with these two only.

What then is the next step one must take for the simplification and precision of the exceptions? I am of opinion that ere long, the exception regarding national honor will be excluded from arbitration treaties, for questions of honor are quite referable to arbitral settlement. It is only our present false conception of honor which is preventing the states from referring this kind of disputes to unreserved arbitration. This thought has been so frequently expressed in America, that reiteration of it at this

¹¹ *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten*, 1907, p. 221.

time seems unnecessary. If, however, questions of honor so serious as to affect the vital interests of the nations should arise, such questions will be excepted from unreserved arbitration by reason of the reservation concerning vital interests. But even supposing the exception concerning national honor were gotten rid of, there would still be left that of vital interests. And the question naturally arises, can this exception also be eliminated without serious difficulty? To my mind, the juridical status of this matter is as follows:

The juridical organization of the world cannot be effected by welding all the states of the world into one realm wherein all nationalities will intermingle. The independence of distinct states is the foundation pillar upon which all organic processes rest. International law rests and will ever continue to rest upon the existence of juxtaposed independent states. This independence, however, is assured only when the vital interests of the individual states are respected.

In questions of secondary importance, not affecting the vital interests, arbitral settlement is ever advisable in consideration of the mere fact that a war always results in greater harm than even complete defeat in arbitration. But the matter is quite different when we are confronted with questions affecting a people's vital interests. In such matters, exigencies arise that are of such importance to the life of the state that its further existence is jeopardized if some at least of these exigencies are not met.

Consequently, if we had such ideal judges, that in each particular case where the vital interests of two states are opposed the legal dispute could be settled in a manner not endangering the vital interests of both states, there never would be the slightest hesitancy to refer vital questions to obligatory arbitration. But, do we at the present time have such ideal judges? In answering this question we cannot evade the admission that there is not as yet at The Hague a body of judges who, by habits acquired from long years of experience, are able to render a decision as nearly ideal as man's judgment can conceive. But even supposing we had such judges, we could not feel absolutely certain that decisions rendered in such questions would bring satisfaction to all the parties concerned. It is exceedingly difficult to define the concept of vital interests. The judges may quite naturally hold varying opinions in regard to this

question; and it is possible, that the decision might prove injurious to the legitimate vital interests of a party.

If what has just been said is accepted as correct, that is to say, if there is the slightest possibility that the legitimate vital interests of a state may be harmed, by the arbitral decision, it is then impossible to refer questions of vital interest to arbitration. We should remember that, when a state subjects itself to the decision of an arbitral court, it must fulfill in good faith the lawful decision of the tribunal, however unfavorably affected thereby. Even in case of absolute defeat, it must stand ready to carry out the decision. And it can do this only when there is a guarantee that the decision does not harmfully affect its continued existence, that is to say, its vital interests. But, if there is the slightest possibility that the decision jeopardizes its vital interests, it cannot then enter into an obligation to submit unreservedly to the arbitral decision, that is to say, it may not, as an honorable entity, conclude such an arbitration treaty.¹²

The special importance which most states attach to the exception concerning independence supports my point of view. All the treaties referred to in this article, having two or more stipulations, contain this particular one. Independence is, however, such an important presumption, such an important vital interest of the states, that such a stipulation should be considered superfluous. It is quite reasonable to state that an arbitral decision must not affect the independence of the states, and that it should also be possible to settle by arbitration questions regarding independence. This would in fact be just, if it were absolutely impossible that the independence of a state could ever be affected by an arbitral decision. But how can we be sure of this? As yet, there are some fundamental rights of the states that are not generally recognized; and as yet we cannot, therefore, appeal against the decision of an arbitral court for violation of one of these fundamental rights. Who will maintain that on the basis of some purely judicial interpretation an arbitral court may not decide against the independence of a state? This is quite improbable. But such a contingency is not

¹² It is a fact that differences of real vital interests have never yet been composed arbitrally. It cannot be said that even the Alabama dispute or Newfoundland dispute comes within this class of most difficult questions.

impossible; and because of this imminent possibility, the states make the independence exception part of almost all arbitration treaties.

From what has been said, we conclude that the reservation concerning vital interests is inherent in arbitration treaties, and that treaties not containing this stipulation cannot be justified from the juridical point of view.¹³ Logically viewed, we must admit that even when not definitely expressed, the stipulation concerning vital interests is yet included in all arbitration treaties. In reference to this point, Zorn was quite correct when, at the meeting of the Interparliamentary Union at Geneva in 1912, he said:

When I review the development of this question from the time when Martens presented his project, to the time of the Taft proposal, I am convinced that arbitration treaties containing no reservations cannot be attained as long as the fundamental principles on which international law and the mutual intercourse of the states rest, remain the same as they now are. By this I do not mean to say that such treaties cannot be concluded. But, in accordance with the present status of international law, they cannot be carried out. * * * And for this very reason, I believe that the famous exception which exists and will ever exist, expressed or not, may be omitted from the text of the treaties because it constitutes a necessary part of the independence of the state.¹⁴

I do not, of course, believe that it would be well if the states should omit this stipulation and leave it to be understood. Greater clearness will certainly be insured by inserting this stipulation into every treaty.

But, whatever the difficulties in the path, we must not cease our efforts to perfect international arbitration treaties. And we naturally will ask what we can do to further the conclusion of arbitration treaties containing no reservations. In the first place, and having in mind the Swedish-Norwegian arbitration treaty, it might be proposed that the states submit to arbitral decision the question whether the particular controversy involves vital interests, so that the stipulation might not

¹³ In saying this, I do not wish to appear as opposing the new project of an Anglo-American arbitration treaty, to which I have, on the contrary, given a different interpretation and shown proof of my sympathetic interest. Cf. my essay "Der englisch-amerikanische Schiedsvertrag," in *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1912, No. 3.

¹⁴ Cf. also the other contributions of Zorn, referred to above. Lammash is of a different opinion in *Jahrbuch des Öffentlichen Rechts*, 1912, p. 109, and Schücking, before cited, p. 131.

be too frequently and arbitrarily used. But, as a result of what has already been said, it seems logical that, if an arbitral court cannot settle questions of vital interests, it cannot with certainty decide the preliminary question.¹⁵ For the very difficulty in this matter is our ignorance as to what vital interests are. Yet, if, in spite of this fact, some state should wish to submit the preliminary question to arbitration, it should then to be logical renounce definitively the insertion of the stipulation concerning vital interests.

I believe, however, that we can approach more nearly the great goal of arbitration without reservation by proceeding along these lines:

(1) We must try to gain an increasingly clearer conception of vital interests and establish its exact meaning. In the first place, the best thought of economists should be enlisted in behalf of this great work; for it is frequently questions of an economic character that concern or seem to concern vital interests.

Jurists may, however, contribute largely to the illumination of the problem by finding out such groups of controversies as can never affect vital interests. At the Second Hague Peace Conference an international prize court was created to which definite prize questions are to be referred unreservedly. It is my firm belief, that when the circumstances in prize questions are justly weighed, it will be found that such questions cannot possibly affect the vital interests of a state. During the discussions at the Second Hague Peace Conference regarding the world arbitration treaty efforts were made to enumerate numerous cases of this kind that should be submitted to arbitration without reservation. Theorists in the science of law should, in more thoroughgoing fashion than hitherto, devote themselves to this problem.

Contrary to views expressed by me in a previous study,¹⁶ I now declare that there may indeed be groups of controversies which can never affect the vital interests of the parties. But we are led to quite a different conclusion when we answer the question, are there kinds of conflicts that never affect the honor of the parties? In this last case I still believe it may be freely asserted that, in particular groups of cases, there is more

¹⁵ Lammash agrees with this conclusion, before cited, p. 102.

¹⁶ Cf. my commentary upon the Hague convention for the peaceful settlement of international disputes, 1911, pp. 63 *et seq.*

or less probability that national honor can never be affected; for, through the most various accidental circumstances, a controversy may develop into a question of honor. But this fact is in my judgment of little or no importance, since I should favor referring all questions of honor to arbitration. On the other hand, the case is quite different in regard to vital interests. For instance, how could a prize question ever affect all the basic foundations, that is to say, the vital interests of a state?

The fact that the stipulation concerning vital interests is to be presumed as forming part of the treaty, even when not expressed, can certainly refer only to agreements of a general character and concerning a large group of controversies; it cannot, however, refer to special kinds of conflicts that in the opinion of the parties can never affect their vital interests. Therefore, I do not agree with Zorn,¹⁷ who states that the prize court agreement implicitly contains the stipulation concerning vital interests. This view could be justified only if, by the prize court agreement, such controversies as might affect the vital interests had been submitted to arbitration. But this is not the case. The meaning of the agreement is not: *We submit these vital interests* (that is to say, prize questions) *unreservedly to arbitration*; rather, it is: *Prize questions can never affect vital interests; therefore, in such questions, the stipulation regarding vital interests cannot be taken in consideration.*

This last point is made even clearer when we realize that in the enumeration of groups of controversies which never affect vital interests, we are not at all concerned about further *restricting*, but solely about *interpreting* the particular stipulation.

(2) The more the status of the territory of the states tends to become permanent, and especially as the earth becomes more completely partitioned among the nations, the fewer will be the colonial questions which make up at the present time such a large number of the questions affecting vital interests. Again, as international traffic develops, and customs-boundaries between the nations disappear, fewer purely economic questions affecting vital interests will arise among the nations. Also, the attainment of the fair goal which Senator La Fontaine, one of

¹⁷ Cf. *Zeitschrift für Politik*, II, p. 361. I find that Zorn does not draw a sharp enough distinction between the stipulations concerning national honor and vital interests.

the oldest and most deserving peace advocates, sketched in beautiful words at the Geneva World Peace Congress of 1912, might in this connection prove of great significance. La Fontaine, in concluding his address of welcome, spoke as follows:

We must also proclaim the international rights of man. The freedom to circulate, to associate, think and to possess must belong to every man over the fair circle of the whole world. The absurd legend that nations are restricted to their national territory and hostile to strangers must be brought to an end; the idea of Germany for the Germans, France for the French, China for the Chinese is a relic of past ages. This question of conflicts between the peoples, one of the most serious, if not the most serious, rests on misconception and error. In the place of hatred and envy I invite you to put this expression of liberation and concord: the earth for mankind.

(3) This last view-point has already opened a new road to us, which will also take us nearer to the great goal: it is the gradual codification of international law, and above it all the fixation of certain fundamental laws.¹⁸ It will, of course, not suffice to develop the material law only. Formal law also must be further unfolded. When, for instance, the territory of a state is guaranteed, an arbitral court might, in spite of this fact, disregard this fundamental principle; this can be prevented only by creating legal agencies against arbitral decisions. The completion of arbitral jurisprudence is, therefore, included also in this development.

(4) But the completion of arbitral jurisprudence will very likely prove less important, because the creation of a real international jurisprudence and of an International Court of Justice is a question of only a short time. And when we shall have such a court, the states will then be, better than hitherto, insured against legal errors. It will then also be possible to submit more controversies than heretofore to arbitral settlement. The states will also more frequently realize the good results of this way of settling disputes and be induced to refer more to such a court.

All these elements will contribute more and more to the end that some day all controversies will be settled through the intermediation of an impartial tribunal.

¹⁸ Cf. de Jong, "Völkerrechtskodifikation und Genfer Friedens-kongress," in *Friedenswarte*, 1912, p. 329.

But, at the close of this essay, the question might well be asked: Is it not true then, in accordance with what has been said, that questions of vital interests can at present be decided by the sword alone? Are not all efforts made to settle all these great controversies through pacific means, exerted in vain?

In my judgment we have even now at our disposal a peaceful and honorable way to settle questions of vital interest, that is to say, adjustment through diplomatic channels. More and more in the great questions of foreign relations, the nations will and must look not merely to their own respective interests, but take into consideration the fact that they are part of a community of states, that is to say, of one civilized community, in which they must all have consideration for each other. This consideration for the interests of the opponent must, of course, never lead to a sacrifice of the vital necessities of their own people. But in case the opponent stands ready to respect the conditions of our existence, for the sole purpose of increasing our prestige or of weakening and humiliating the other party, we must not exact more than is our due. If we ask that the opponent respect our vital interests, then we must leave his own unimpaired also.

There is now manifest in the faithful execution by the states of numerous non-political treaties a powerful sense of justice in the community of states which we must assiduously foster. It is the duty of the advocates of peace to point incessantly to that noble idea and call it to the attention of the states. In this way there is the possibility of settling through diplomatic negotiations all those controversies that cannot at present be adjusted through arbitration.

DR. HANS WEHBERG.

INTERNATIONAL LAW AND POLITICAL SCIENCE

It is a truism that the science of law proper — the science dealing with the national law of each nation — is very different from the science of what is called international law. In the study of the law of the United States or the law of Great Britain, one finds the whole science based on the fact of the existence of a political society known as the United States or Great Britain, which formulates, applies and enforces the law which governs these nations in their internal relations. When one enters upon the study of what is called international law, one finds himself expected to accept as a fundamental proposition that there is no political society which formulates, applies and enforces the law which he is told governs all nations in their external relations, and that this law is formulated, applied and enforced *among* or *between* the nations. This difference in fundamentals leads to corresponding differences in the derivative notions. Practitioners of law proper take little or no interest in what is called international law. From their point of view, that which is called international law is only a collection of the rules of a highly interesting game, success in which depends largely upon "face" and personality; nor can it be denied that there is much to justify this opinion. Students of law reflect the attitude of mind of the practitioner, and the great majority of students end their legal education when they finish the courses in national domestic law, giving no consideration to the law which governs the actions and relations of the nations.

In recent years, the development of what is known as political science, which is the science dealing with the structure and working of political societies, has accentuated the difficulties of students who wish to gain some knowledge of the political and legal affairs of the world. They study the structure and working of the town, the county, the state, and the nation for the purpose of making these political societies more economical and efficient. They even go beyond the confines of the nation and study the structure and working of vast political organisms

like the British Empire for the same purpose. But when they seek to apply political science to the structure and working of the whole human society, they are confronted by a prevalent idea that beyond the limits of nations, or at least beyond the limits of political organisms like the British Empire, there is political chaos. They are taught that the nations are sovereign and independent, but that all the nations have the mutual attribute of solidarity. If the word solidarity is given its technical meaning, it seems not to imply a complete or a federal unity, but rather a mutual relationship of the persons or societies concerned under an implied contract of each with each, and with all, whereby all are the mutual guarantors of each other. In this technical sense, solidarity of the nations, seems, when analyzed, to imply a universal extension of the balance of power system, which for four centuries has drenched Europe with blood. If the nations are mutually guarantors of each other, it necessarily follows that if one nation becomes expansive or aggressive, "international solidarity" compels its surrounding neighbors to ally themselves so as to balance or overbalance the power of the aggressor nation, for the purpose of holding it in check. This is exactly the balance of power system. It leads to shifting alliances, *ententes* and *concerts*. The system in operation is essentially a military game, requiring the application of rules of strategy. It is the antithesis of political organization, and though it may ultimately lead to political organization through the exhaustion of the parties and their perception of the waste and inefficiency involved, it frequently involves a military dictatorship as an intermediate process.

But the march of events is modifying this technical meaning of solidarity, and the word is coming into popular use in a new and enlarged sense as implying an existing unity, federal in type, of the whole body of the peoples and nations of the world. This enlarged meaning of solidarity is apparently due to the effort of the public mind to find a word to express the altered views which people everywhere are beginning to have concerning human society as a whole. Educated and uneducated persons alike, familiarized by the public press with the doings of all the peoples and nations of the world through the processes of modern invention, now understand that the world is made up of political societies much resembling those to which they are accustomed. It is becoming

more and more impossible to induce the average man to believe that his nation is related to other nations after the manner of savages or half-civilized persons. It is becoming increasingly easy for him to realize that all the peoples, countries, states, nations and empires of the world are in fact, by the necessity of the case and by their own consent, united into one great political organism and society. It has become necessary to give this inclusive society a name, and the name of "the society of nations" is rapidly becoming attached to it—not because the name is scientific and strictly accurate, but because it is brief and expresses fairly well the idea intended.

The fact seems to be that in this last decade, there has occurred what may be termed in some sense a peaceful revolution and in some sense a renaissance. There has been during this period a change of thought away from the accepted philosophy and a taking up with a new philosophy of a higher type. For a political economy which regarded human happiness as based on production and distribution of commodities, and made credit—the inviolability of contracts—the prime requisite, there is being everywhere established a political philosophy which is based on the moral worth and dignity of the individual, and insists that contracts and relationships inconsistent with this dignity are not of binding force. All contracts and relationships are subjected to this test of invalidity, and, as all social and political organization is in its last analysis only a system of individual contracts and relationships, all such organization is being subjected to the same test. Thus, all forms of social and political organization which are inconsistent with the moral worth and dignity of the individual are coming to be regarded as void, and governments are considered to be just, economical and efficient, not according as they protect the production and distribution of commodities, but according as they recognize, protect and preserve the moral worth and dignity of each and all individuals. Political organization is thus regarded as an inseparable incident of human life and as an attribute of the individual. In other words, we are changing to a philosophy which treats political organization and government as in part an attribute and in part a creation of man. Where two human beings exist together, contracts and relationships exist between them and they form a community, in spite of themselves, which is a political organization.

and a government. Political organization and government are, in this new philosophy, regarded as necessities which the individual must have whether he will or not, just as he must breathe air or drink water. He may take government in a crude and harmful form, just as he may breathe bad air, or drink polluted water; but he cannot avoid being in contractual or actual relationship with other human beings and hence forming a political organization with them any more than he can avoid breathing or drinking. All he can do is to see to it that he gets pure government, pure air and pure water.

This new philosophy, as has been said, is gradually making its way, tempering the harshnesses of the old trade and credit economy. That philosophy had resulted in the sacrifice of human life and dignity to the production and distribution of goods, in the inviolability of contracts even though they called for the sacrifice of life and dignity, and in free competition whereby the strongest might overcome the others and establish any relationships with the vanquished even to the destruction of life and dignity. The new philosophy is altering the outlook of the individual upon all kinds of social, economic and political organization. Each individual recognizes all kinds of organization as a possible means of extending his own powers, though capable of being perverted so as to injure or destroy him. He is beginning to understand that organization exists and that all he can do is to change it; and as he seeks for a limit to the extension of organization, his mind refuses to stop short of the whole human society. As each human being is born a citizen of his city, a citizen of his state, or a citizen of his nation, so also, it is being realized, he is born a citizen of that great inclusive society composed of all the peoples and nations of the world. He may change his citizenship in the city, the state, or the nation; but his citizenship in this great inclusive society which, for want of a better name, we call "the society of nations" is permanent and unchangeable. He cannot escape this citizenship; he can only improve the organization so as to make it more consistent with the moral worth and dignity of himself and all other human beings. Nor can the whole body of the peoples of the world by any action prevent the society of nations from existing. They cannot even ignore it, for once it is recognized, it becomes the only permanent human institution, and an object of the solicitous care of the peoples and nations; for

through the society of nations, the nations as well as the individual realize the fullest extension of their powers.

It requires but a moment's reflection on the part of an intelligent person to perceive that if the common sense and judgment of the world accept the society of nations as a part of present day practical politics, it can be made a subject of study by political science exactly in the same way as a town, a city, a state, a nation or an empire. In this view, the law which governs the nations is the law which is imposed on the nations by the society of nations. The nations obey this law not because they wish to do so, or because they agree to do so, or because they regard it as a matter of honor to do so, but because the peoples and nations of the world recognize themselves as together forming a political society which is greater than any nation and which includes all nations, and have delegated to that society the function of formulating, applying and enforcing a constitution and law for the common and general purposes of all the nations. The constitution and law so formulated by this political society by virtue of its delegated power, bind the separate nations and their peoples in the same way that the constitution and law of the United States bind the States of the United States and their peoples. That which is called international law is thus seen to be the law of the society of nations, or, to use the briefer and more popular expression, the law of nations.

It is true, there are difficulties in the way of the acceptance of these modern notions. In the society of nations there is nothing to be found exactly resembling a constitutional convention, a legislature, an executive or a court, as we know these institutions in our national life. Nevertheless, in the society of nations one may distinguish and identify crude institutions of a constitution-making, legislative, executive and judicial character and may discover crude constitution-making, legislative, executive and judicial processes going on by which the constitution and law of the society of nations are gradually being formulated, and by which those constitutional and legislative provisions which have been formulated are being interpreted, applied and enforced.

When the society of nations is further studied according to the methods and principles of political science, it will be found that, although it is in the primitive stages of organization, it even now bears a general

resemblance to a federal state. The central government at the present time will be found to be deposited in commission, and the commission is of so indefinite and changeable a character as to be hardly recognizable. The Hague Conferences and the Hague Tribunals have tended to visualize the central government of the society of nations, but these institutions are, after all, but a fractional part of the institutions which even at the present moment constitute the central government. The indefiniteness concerning the location of the central government and concerning the nature and extent of its powers leads to a corresponding indefiniteness respecting the residual powers of the various nations. The nations, on account of these deficiencies in the central government, are obliged to act in a double capacity, and at times not only to perform their own domestic functions, but to exercise the functions of the central government. Thus, though the principles of federal government are to be taken as a general guide in studying the structure and working of the society of nations as a matter of political science, and in studying the law of the society, these principles are subject to many qualifications and variations, due to the present indefiniteness of the organization of that society.

For the purpose of showing how the acceptance of the society of nations as a fact of practical politics alters the fundamental principles of the law which governs the nations, it will be attempted to state these principles. Such a statement might be as follows:

1. The society of nations is a political society composed of all the peoples, countries, states, nations and empires of the world. It exists by its own recognition of its existence, having on human superior. It is permanently instituted by the necessity of the case and by the common consent of all the peoples, countries, states, nations and empires as their supreme organ for formulating, applying and enforcing their conscience and will as respects the general measures necessary for their common protection and welfare, and for the preservation of the component nations and political societies without change except as may be needful for the common good. The society of nations establishes and maintains such constitution-making, legislative, executive and judicial institutions and processes, as are considered by the people and nations of the society to be best adapted for these purposes respectively.

2. The law of the society of nations is the body of rules, duly formulated, applied and enforced by the society of nations through appropriate institutions and processes, regulating the actions and relations of the nations and their citizens. This law extends only to the common and general purposes of the nations and the whole society, and resembles the federal law in a federal state.

3. The law of the society of nations (like the law of all states, particularly the law of federal states) is divided into three grades — the organic (or constitutional) law, the statutory law, and the customary (or common) law. The organic law is superior to both the statutory and the customary law. The statutory law is superior to the customary law. The organic (or constitutional) law is composed of those principles which are so fundamental and permanent as to be indispensable to the structure and organic existence of the society. The statutory law is composed of those principles, consistent with, dependent upon and in support of the organic law, which are formulated and established by legislative institutions and methods. The customary (or common) law is composed of those principles, consistent with, dependent upon and in support of the organic and statutory law, which are formulated and declared by courts or judicial tribunals in cases arising before them, based on common and accepted custom of the peoples and nations of the society.

4. The present organization of the society of nations being indefinite, the ultimate constitution-making, legislative, executive and judicial power of the society is for the present vested in the nations, acting collectively or separately as the organs of the society. The highly civilized and well-armed nations take the lead in formulating, applying and enforcing the constitution and law of the society, partly by the general consent, and partly by the necessity of the case; but all the nations are at liberty to formulate, apply and enforce, individually or by agreement, such principles as they may consider it probable the society of nations would formulate, apply and enforce in the circumstances. The use of armed forces by separate nations to establish justice and maintain order, in execution of the constitution and law of the society of nations, is justifiable, and is not to be regarded as war, but as constabulary action in the name of the executive power of the society of nations.

5. Nations, states, or countries, may form any sort of relations or make any contracts with each other which are not self-destructive as respects either party or destructive as respects third parties, and which are not opposed to the constitutional dispositions of jurisdiction accepted by the society of nations, or to the limitations imposed upon the nations by the constitution of the society. When a relationship is thus established, or a contract is thus made, the same principles apply in interpreting the relation or contract as are applied in interpreting similar relationships or contracts between individuals or corporations, or between the states of a federal union; but these principles are to be applied only by way of analogy.

6. All differences between nations with respect to which there exists a duly formulated and settled principle of the organic law of the society of nations and also a duly formulated statutory principle or an established custom consistent with such organic principles, or with respect to which the parties are able to agree upon principles which are to be regarded as principles of the law of the society of nations for the purposes of the case, if not settled by agreement, may be settled by arbitration or by the decision of a court of the society of nations. Where there are no such principles, and the parties are unable to agree upon such principles for the purposes of the case, other nations may mediate for the purpose of finding a way to settle the difference, or the matter may be postponed to await the formulation and establishment of the applicable principles by a conference of all the nations or of all the nations interested; and it is the duty of all nations to urge such postponement, and to co-operate for the formulation and establishment of such principles. When such postponement is impossible, armed force applied by one nation against another to compel it to recognize a principle of the law of the society of nations which approves itself to the common juridical conscience of the world, is justifiable.

7. Treaties between nations for the arbitration of disputes between them not capable of settlement by agreement, or for the submission of such disputes to judicial settlement, should exclude all cases which involve a principle of the organic law of the society of nations which has not been formulated and settled by the constitution-making action of the nations, since it is not the function of arbitral tribunals or courts to

formulate and settle the organic law of the society of nations. These principles can only be settled by the nations directly, either by joint agreement, or by the insistence of one or more nations backed by armed force if necessary, supported by the common juridical conscience of the world. In an arbitration or judicial settlement of disputes other than those last mentioned, under a general arbitration treaty, the tribunal or court is to apply the settled principles of the organic, the statutory, and the customary law of the society of nations in the order of superiority as above stated. In interpreting settled principles of the organic law of the society of nations, the tribunal or court is to be guided by analogy drawn from the principles of the constitutional law of states and nations, and particularly by analogy drawn from the federal constitutional law of federal states. In interpreting settled statutory rules of the law of the society of nations not inconsistent with the organic law, the tribunal or court is to be guided by analogy drawn from the rules of the law of states and nations relating to the interpretation of statutes, and particularly by analogy drawn from the rules relating to the interpretation of federal statutes in federal states. In declaring and interpreting the customary law of the society of nations not inconsistent with the organic and statutory law, the tribunal or court is to consider all treaties and all national statutes or judicial decisions involving principles applicable to the case, and is to be guided by analogy drawn from the statutory and customary law of states and nations, and particularly by analogy drawn from the federal statutory and common law in federal states. Such analogies are not to be pushed to the point where national rights of self-protection and self-preservation would be endangered by premature or excessive admixture of peoples in different stages of civilization or of divergent ideas or sentiments, or by unregulated economic competition; but all reasoning by analogy drawn from state or national action is to be subject to national rights of self-protection and self-preservation, since the existence of the nations is fundamental to the existence of the society of nations. When disputes arise between nations under treaties, the tribunal or court is to consider the treaties themselves as subject to the law of the society of nations. Treaties found by the court to be repugnant to the law of the society of nations are to be held contrary to public policy and void, to the extent that

they are so repugnant, and the case is to be decided according to the law of the society of nations.

8. The autonomy of all nations is inviolable except where the autonomy of a nation is opposed to the constitution and law of the society of nations and is inconsistent with the peace and welfare of the society. An entry by a nation into the territory of another in the name of the executive power of the society of nations, must be based on an intolerable condition of anarchy there prevailing or upon a breach of the law of the society of nations by the nation entered, of so serious a character as to render restraint or punishment of the nation necessary, in the interests of the society of nations; and the constabulary power thus applied must be only carried to the extent necessary to effect the necessary reorganization of the nation thus policed. If entry by armed force is made without due cause by one nation into the territory of another, the nation entered has the right to use its armed force in self-defense; and the right of self-defense exists when, after lawful entry by a nation, it attempts the destruction or excessive punishment of the nation entered.

9. An entry by a nation into the territory of another nation, made by means of armed force, even though lawful as an exercise of the executive power of the society of nations, gives of itself to the constabulary nation no right to territory or property of the nation policed; but a transfer of the territory of the nation thus policed, or an indemnity, may be awarded to the constabulary nation by the concert of the nations or by the concert of the interested nations, of such extent or amount as may be proper, considering its expenditure or loss and all other circumstances.

It will be noticed that in the above statement of the fundamental principles of the law of the society of nations, there is a wide departure from the various *Codes de la Paix* with which the pacifist literature abounds; in that the application by a nation of armed force outside its limits is not considered as in all cases unjustifiable and illegal. Such principles are undoubtedly inconsistent with immediate disarmament, but they are, it may be confidently asserted, the only principles likely to bring about a general condition of peace. The recognition of the society of nations as an existing fact gives a basis for distinguishing between those applications of armed force by nations which are and ought to be lawful as exercises of the executive power of the society of nations,

and those which are and ought to be unlawful as acts of robbery or oppression. Any application of armed force by a nation against another which tends to support at the same time the nations and the society of nations is and of right ought to be lawful, and armed force directed by a nation so as to produce the contrary effect is and ought to be unlawful. Being thus able to distinguish between constabulary action and war, it remains only to educate public sentiment so that more and more the application of armed force by the nations shall in fact be constabulary action in the name of the executive power of the society of nations. As the area of constabulary action increases, the area of war necessarily diminishes. As the peoples and nations of the world become more and more habituated to the notion of the application of armed force by the nations for the constabulary purposes of the whole society, separate nations will gradually become anxious to rid themselves of this constabulary burden and will be ready to unite in forming some plan for delegating their constabulary responsibilities. When this occurs, war will be abolished in the society of nations by exactly the same process that individual fighting and private war have been abolished in the separate nations — that is, by political organization. The crude constitution-making, legislative, executive and judicial institutions and processes which now exist in the society of nations will gradually be improved upon and rendered more definite and efficient, and some kind of arrangement will ultimately be made which will minimize the burden of constabulary action and preserve the general peace and order.

From what has been said, it may, it would seem, be concluded that international law in its literal and technical sense as law between or among nations is destined gradually to pass into the oblivion which awaits outworn sciences and philosophies, both because such a law is inherently impossible as a matter of jurisprudence, and because it cannot be squared with the principles of political science. If the name international law is retained, therefore, it must be given an enlarged meaning, so that it shall in fact mean the law of the society of nations. Such a meaning has already been attempted to be attached to it by many writers, and from the time of Grotius the society of nations has been recognized by publicists in a figurative sense. What is now needed is, that publicists should accept the society of nations not in a figurative

but in a literal sense, as an existing and permanent fact of practical politics — as a political organization having a concrete existence just as really as has the United States or as has Great Britain. Until recently, the facts of international life have made men in practical politics hesitate to accept this fact and have compelled them to adopt compromise notions. Violent insistence upon national sovereignty has required equally violent assertions of national sovereignty in return. The situation has now changed, and almost without our notice the facts of international life have become such that the conception of a society of nations and of a law of this society has become more reasonable as a working basis of action than the conception of the nations as wholly sovereign and wholly independent, living under agreements with each other which they choose to regard as law.

No doubt for a long time to come there will be few principles of the law of the society of nations which will be so definitely formulated and established that any national court would think of applying them in superiority to a treaty or a national law with which they should conflict. As international tribunals increase, however, the question of the effect which should be given to principles of the law of nations as controlling and superseding treaties and national laws inconsistent with these principles will become a pressing one. If the Court of Arbitral Justice is established at The Hague, it will be essential to its success that the principles of the law of the society of nations should, within the sphere suitable for that law, control and supersede all conflicting treaties and national laws. That court already exists in principle by the action of the Second Hague Conference. It wants only the appointment of the judges. Once established, it will be a court of the society of nations. If it gives effect to all treaties and all national laws which bear on the cases brought before it, without ascertaining whether or not they conflict with the organic, statutory or customary law of the society of nations, it will abdicate its high function and become merely a part of the diplomatic machinery of the disputing nations. Thus in a very concrete sense, the idea that a society of nations exists and that it has formulated and is formulating a federal law which within the sphere of the common interests is superior to treaties between the nations and superior to the municipal law of each nation, is of service at

the present time; for on the acceptance of this idea depends the establishment of the Court of Arbitral Justice at The Hague.

But even if we leave out of consideration the proposed new court at The Hague, and look solely at the general benefit to be derived from the prevalence of this idea, we may find good reasons for accepting it. It is to be noticed that the society of nations has no human superior, and that it exists not by any external recognition, but by the mental and psychological action of the individuals who compose it. No formal federation of the nations is necessary. It is only necessary for the peoples and nations of the world to recognize themselves as forming one organized political society. Each individual and nation is as important as any other in exercising the power of recognition, and each individual or nation is equally entitled to participate in the work of improving the organization of the society to which he belongs. Historians have noted that the beginning of the real progress of a nation occurs when its people realize their existence as a nation, and come to understand that the nation in the hands of the people can be made one of the greatest means for extending the power of the individual and enabling him to increase his own happiness. Out of such a popular conception of the nation and of the possibilities of individual good to be derived from an economical and efficient national organization, has developed the whole system of democratic representative and responsible government, whereby each person capable of intelligent judgment is enabled to participate, in an orderly and appropriate manner, in the direction of each political organization of which he is a member. On such ideas is based the present progressive movement, which is extending throughout the world. That movement is, in each nation, a conscious effort of individuals, parties and corporations to invent improvements in existing political organization, so that town, city, state and nation may in their respective spheres operate more economically and efficiently in extending the powers of the individual and enabling him to increase his happiness. A similar consciousness, shared by all the peoples of the world, of the existence of the society of nations as the one permanent and all-inclusive nation, and a similar appreciation by them of the possibilities of human betterment through improvements in the organization and working of this great society, must, it would seem, necessarily result in

broadening the progressive movement, and lead to a conscious and persistent effort of individuals, parties and corporations in all parts of the world, directed toward improvements in the organization of this great nation, to the end that it, too, may be made more efficient in extending the powers of the individual and enabling him to increase his happiness. As such conscious efforts applied within each nation by its citizens have always resulted in a notable increase in the prevalence of justice, order and peace among the individuals forming the nation; so similar efforts by citizens of the society of nations may ultimately result in a prevalence of justice, order and peace among the scattered and diverse peoples and nations which together form the society of nations, in some degree approaching that which each nation now enjoys within its own borders.

Lest what has been said may be thought to furnish some support for those who seek the immediate federation of the world under a "parliament of man" enacting a "world-law," let it be said that there is nothing in the foregoing which is intended to give support to any such idea. The form which the organization of the society of nations will take, and the changes in the constitution-making, legislative, executive and judicial processes of the society which will occur, as the result of progressive improvement, it is impossible to foretell. It may well be that the ultimate form will be quite different from anything yet known, and one which would be unimaginable at the present time.

ALPHEUS HENRY SNOW.

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EDITORIAL COMMENT

PRESIDENT WILSON AND LATIN AMERICA

The form of government is immaterial in international law, provided that the form be such as to enable the state whereof it is the organ to meet and promptly to comply with its international obligations as a member of the society of nations. It is frequently said that international law does not cross the threshold, but stops at the frontier, and this is true so far as the internal organization of any country is concerned. If this view is correct — and it is assumed to be correct for the purposes of this comment — a change of administration is an internal matter of no international importance and concern; and yet experience shows, notwithstanding theory, that the personnel of an administration is not

immaterial and exercises a direct influence upon the conduct of international relations, as well as upon the relations themselves. It is therefore of interest to consider very briefly the intellectual outlook of the new President of the United States, who assumed office on the 4th day of March, 1913, and the point of view of the new Secretary of State, who took the oath of office on March 5th.

Mr. Woodrow Wilson came to the presidency after years of patient study of and reflection on the nature and function of the state, as is shown by his text entitled *The State: Elements of Historical and Practical Politics*, first published in 1889, a work based upon a careful consideration and analysis of foreign as well as English literature, which is used as a text-book in American colleges and universities and quoted with respect by foreign publicists. It is just such a work as is to be expected from a professor of jurisprudence and politics in Princeton University, who had studied law and who had the training to be acquired in the graduate department of one of the greatest of American universities. For present purposes his *History of the American People*, first published in 1902, should be cited as showing his familiarity with the development of the United States, which he is called upon to direct, and with those traditions, written and unwritten, which have given it a secure place in the society of nations and in the affections of enlightened leaders of thought who, irrespective of nationality, look upon the United States, in certain respects at least, as the ideal toward which they should approach. The American people were therefore prepared for the final announcement which Mr. Wilson made on November 4, 1912, in closing his presidential campaign:

"We must shape our course of action," he said, "by the maxims of justice and liberality and good will, think of the progress of mankind rather than of the progress of this or that investment, of the protection of American honor and the advancement of American ideals rather than always of American contracts, and lift our diplomacy to the levels of what the best minds have planned for mankind."

And, given Mr. Wilson's constancy and determination, they were prepared to believe that he would translate these brave words into action as soon as circumstances should permit or suggest. The troubled situation in Mexico, which has unfortunately existed in that stricken republic since the overthrow and exile of Porfirio Diaz, who had maintained law and order at home and created for Mexico respect and confidence abroad, gave Mr. Wilson at the very beginning of his administration an oppor-

tunity, which he promptly seized, to express his views and the views of his administration toward Latin America. On March 12, 1913, he issued the following statement, which was telegraphed on the same day by the Secretary of State, through diplomatic officers, to Latin America:

In view of questions which are naturally uppermost in the public mind just now, the President issues the following statement:

One of the chief objects of my administration will be to cultivate the friendship and deserve the confidence of our sister republics of Central and South America, and to promote in every proper and honorable way the interests which are common to the peoples of the two continents. I earnestly desire the most cordial understanding and co-operation between the peoples and leaders of America and, therefore, deem it my duty to make this brief statement.

Co-operation is possible only when supported at every turn by the orderly processes of just government based upon law, not upon arbitrary or irregular force. We hold, as I am sure all thoughtful leaders of republican government everywhere hold, that just government rests always upon the consent of the governed, and that there can be no freedom without order based upon law and upon the public conscience and approval. We shall look to make these principles the basis of mutual intercourse, respect, and helpfulness between our sister republics and ourselves. We shall lend our influence of every kind to the realization of these principles in fact and practice, knowing that disorder, personal intrigue and defiance of constitutional rights weaken and discredit government and injure none so much as the people who are unfortunate enough to have their common life and their common affairs so tainted and disturbed. We can have no sympathy with those who seek to seize the power of government to advance their own personal interests or ambition. We are the friends of peace, but we know that there can be no lasting or stable peace in such circumstances. As friends, therefore, we shall prefer those who act in the interest of peace and honor, who protect private rights and respect the restraints of constitutional provision. Mutual respect seems to us the indispensable foundation of friendship between states, as between individuals.

The United States has nothing to seek in Central and South America except the lasting interests of the peoples of the two continents, the security of governments intended for the people and for no special group or interest, and the development of personal and trade relationships between the two continents which shall redound to the profit and advantage of both and interfere with the rights and liberties of neither.

From these principles may be read so much of the future policy of this government as it is necessary now to forecast; and in the spirit of these principles I may, I hope, be permitted with as much confidence as earnestness to extend to the governments of all the republics of America the hand of genuine disinterested friendship and to pledge my own honor and the honor of my colleagues to every enterprise of peace and amity that a fortunate future may disclose.

It is refreshing to learn from this formal and carefully considered statement of policy that one of the chief objects of President Wilson's administration will be not merely "to cultivate the friendship," but to

"deserve the confidence of our sister republics of Central and South America" and to "promote in every proper and honorable way" not merely the interests of the United States, but "the interests which are common to the peoples of the two continents." There is nothing startling in the statement that we desire the friendship of our neighbors to the south, but the determination to *deserve* their confidence recognizes a duty which is an indispensable prerequisite to any lasting friendship.

President Wilson pledges co-operation, but he properly conditions co-operation upon "the orderly processes of just government based upon law, not upon arbitrary or irregular force." There is a ring of the Declaration of Independence in the statement that "just government rests always upon the consent of the governed," and that "there can be no freedom without order based upon law and upon the public conscience and approval." The friendship to which he refers is not the friendship arising from concession or the advancement of special interests. Mutual respect is the basis; for does he not say that "mutual respect seems to us the indispensable foundation of friendship between states as between individuals?"

If the paragraph of the statement from which these quotations have been taken can be regarded as a word of advice or warning to Latin America, the next paragraph states in clear and unmistakable terms the attitude which the United States should observe toward Latin America. Thus, "The United States has nothing to seek in Central and South America except the lasting interests of the peoples of the two continents, the security of governments intended for the people and for no special group or interest, and the development of personal and trade relationships between the two continents which shall redound to the profit and advantage of both and interfere with the rights and liberties of neither." The importance of this passage at the very beginning of the new administration cannot be overestimated, for within a single sentence the President reaffirms the best traditions of American diplomacy. It recalls the noble language of a great Secretary of State, Mr. Elihu Root, who, standing for the first time on South American soil, surrounded by the official representatives of every American state at the Conference of Rio de Janeiro in 1906, assured them that

We wish for no victories but those of peace; for no territory except our own; for no sovereignty except the sovereignty over ourselves. We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire, and we deem the observance of that

respect the chief guaranty of the weak against the oppression of the strong. We neither claim nor desire any rights, or privileges, or powers that we do not freely concede to every American republic. We wish to increase our prosperity, to expand our trade, to grow in wealth, in wisdom, and in spirit, but our conception of the true way to accomplish this is not to pull down others and profit by their ruin, but to help all friends to a common prosperity and a common growth, that we may all become greater and stronger together.

WILLIAM JENNINGS BRYAN, SECRETARY OF STATE

It is said that the lawyers of the country look to the first decision of a newly appointed Justice of the Supreme Court upon a question of constitutional law as a test of his qualifications for the Supreme Bench. In the same way it may be said that the country looks to the President's choice of a Secretary of State as the measure of the Cabinet's efficiency, and to the policy framed by the Secretary of State in the first few weeks of his incumbency as an earnest of a successful or unsuccessful administration. While President Wilson is to be credited with the selection of Mr. Bryan as Secretary of State, the choice, while personal and agreeable to Mr. Wilson, was in reality a recognition of the rank and file of the Democratic Party, whose candidate for the presidency Mr. Bryan had been on three different occasions and whose confidence he had never forfeited. The President and the Secretary of State are in hearty accord upon the principles which should govern the United States in its foreign policy and, if the administration is to be judged by the foreign policy as framed and proclaimed in the first month of its existence, it is evident that we may expect a highly successful administration.

A distinguished Secretary of State attributed his success to the fact that he continued and carried to completion the policies of his predecessor in so far as they were based upon the traditions of the Department, and that he handled the new questions that arose in his own administration according to the same traditions. Secretary Bryan has evidently acted upon this principle. The Latin-American policy contained in the statement of March 12, issued by the President after consultation with Secretary Bryan, is the almost uninterrupted and traditional policy of the United States toward its neighbors to the south. The statement on the Chinese loan, which seals the doom of dollar diplomacy, framed after consultation with Secretary Bryan and issued by the President on March 19, is likewise in accordance with the almost uninterrupted and traditional policy of the United States in the Far East. The views ex-

pressed in these remarkable documents entitle them to rank as state papers of the highest importance, and a continuation of the policy therein outlined cannot but benefit Latin America and China, and redound to the credit of the United States.

In Mr. Bryan's long and distinguished career he has invariably stood for the rights of all, as distinguished from a part, of the American people. It is to be expected that he will consider each and every member of the society of nations as entitled to equal rank and respect, and that he will, in so far as in him lies, encourage by just action and sympathetic consideration the states of the Western World to continue their development and to assume in the society of nations the rank, dignity and importance which belong to them as independent states. As an American Mr. Bryan is naturally interested in our neighbors to the south; as an American who has traveled widely among them, his interest is personal, and we are justified in expecting that his official acts will bear the impress of the personal friendship and respect which intercourse with them cannot fail to engender. Fortunately we do not need to speculate as to his attitude toward South America, as he himself has stated it in clear and unmistakable terms in an address which he delivered as Secretary of State at a dinner given him on March 13 by the Governing Board, of which he is chairman, of the Pan American Union. In his very opening sentence he made this clear beyond peradventure.

Thus, "Whatever lack of confidence I may have," he said, "in regard to other duties that may fall to the occupant of the office with which his Excellency, President Wilson, has honored me, I feel sure that he could have found no one either in our party or in our country who could meet more cordially the representatives of Central and South America. When the office was tendered me, one of the reasons that I gave for being willing to accept it was that it would enable me to join with our President in cementing even more closely to us the nations that live so near us and are so identical with ours in their purposes and aspirations."

After describing his visit to Latin America, its pleasant memories and the information resulting from it, he said:

As a representative of our government — as the one who by virtue of his office comes into closest contact with those who are here, the accredited representatives of other lands — as the occupant of this position, I say, I am grateful for this opportunity to meet you and to mingle with you. I am glad to assure you of the pacific purpose and the genuine friendship which the President of our great nation entertains toward all the people and all the governments of Central and South America, and to assure you

that I am in complete sympathy with him in this friendship and this interest. We desire that you shall know us and that our people should know you. We desire that our exports to your country shall increase and that our imports from your country shall increase, but I believe that the most valuable thing that can be sent across the border line of nations is an ideal. I am glad, therefore, that however we may feel about the tariff on other commodities there is free trade in ideals; we have gathered ideals from all the world; we are indebted to the world for ideals selected from every section. I have no doubt that we shall be able to borrow from the experiences of our neighbors on the south and we shall be glad to loan to them anything that has been developed and perfected here. We are not only glad to give you the advantages of our experience, not only glad to allow you to learn by our trials, our experiments and our mistakes, but we are glad to have our people go among you, to assist you in developing the resources of the great countries that lie to the south of us. I am sure that I speak for his Excellency, the President, as I speak for myself and for all associated with him in authority, when I say that we shall insist that the business men who go from our country to yours, to help to develop your resources, shall carry with them the same high standard of honor and integrity that we demand of business men in our country. We shall be even more exacting of them, for when people come among us, if they find a man who is bad their good opinion of our country will be unshaken because they will know that he is an exception; but when a man goes from us to a foreign country he must be even better in behavior because there are not so many to help him represent our nation. I am sure that this administration will be quick to admonish all who go among you that they go to represent the highest ideals of our country and that they must not fall below that standard.

It would be invidious to single out for commendation any expression in this admirably worded address, but Mr. Bryan's statement that "the most valuable thing that can be sent across the border line of nations is an ideal" will, if carried into effect — as those who know Mr. Bryan cannot possibly doubt — not only assure the success of his administration, but will restore and enhance the prestige of the United States of which we are justly so proud, for American ideals are and always have been our real claim to distinction and respect.

THE PASSING OF DOLLAR DIPLOMACY

The United States as a government and a people has always been interested in the development of China, and both government and people have sought to aid China in various ways and with varying degrees of success. Mr. John Hay, as Secretary of State, felt that the best way to protect China against dismemberment and to enable it to increase its standing in the society of nations was a declaration of policy on the part of all nations to be satisfied with equal opportunity, and formally and

in explicit terms to renounce any intention, either at present or in the future, to obtain special privileges. This policy, called the "Open Door," has already become a tradition, and is not the least claim of Mr. Hay and of the country he served to respect and consideration. It may properly be considered as the formal desire of the United States to protect the independent existence of China and to prevent separate or concerted action on the part of foreign nations, which might consciously or unconsciously affect the independent existence of China in the future.

As further indicating the interest of the United States in the independence and integrity of China and the principle of equal opportunity for the commerce and industry of all nations, attention is called to the notes of November 30, 1908, exchanged between Mr. Hay's enlightened successor, Secretary Root, and the Japanese Ambassador, Mr. Takahira. These two documents, identical in their material parts, are not a treaty in the formal sense of the word, but rather a declaration:

1. It is the wish of the two Governments to encourage the free and peaceful development of their commerce on the Pacific Ocean.
2. The policy of both Governments, uninfluenced by any aggressive tendencies, is directed to the maintenance of the existing status quo in the region above mentioned and to the defense of the principle of equal opportunity for commerce and industry in China.
3. They are accordingly firmly resolved reciprocally to respect the territorial possessions belonging to each other in said region.
4. They are also determined to preserve the common interest of all powers in China by supporting by all pacific means at their disposal the independence and integrity of China and the principle of equal opportunity for commerce and industry of all nations in that Empire.
5. Should any event occur threatening the status quo as above described or the principle of equal opportunity as above defined, it remains for the two Governments to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take.¹

As illustrating the friendly interest which the United States has taken and, as appears from President's Wilson's formal statement on the Six-Power loan, still takes not merely in the independence and integrity of China, but in its people, one further reference should be made to a transaction more likely to secure the friendship of the Chinese people and to enhance the prestige of the United States in the Far East than any loan that could possibly be negotiated. Reference is made to the action of

¹ Foreign Relations of the United States (1908), p. 511; this JOURNAL, Vol. III, pp. 168-170.

the United States, upon Secretary Root's recommendation, to reduce the indemnity bond of \$24,400,000, to which the United States was entitled for losses incurred in the Boxer troubles, to the sum of \$13,655,492.69, and "to remit the remainder of the indemnity as an act of friendship."²

In acknowledging this action of the United States, the Prince of Ch'ing said, under date of July 14, 1908:

On reading this dispatch I was profoundly impressed with the justice and great friendliness of the American Government, and wish to express our sincerest thanks.

Concerning the time and manner of the return to China of the amounts to be remitted, the Imperial Government has no wishes to express in the matter. It relies implicitly on the friendly intentions of the United States Government, and is convinced that it will adopt such measures as are best calculated to attain the end it has in view.

The Imperial Government, wishing to give expression to the high value it places on the friendship of the United States, finds in its present action a favorable opportunity for doing so. Mindful of the desire recently expressed by the President of the United States to promote the coming of Chinese students to the United States to take courses in the schools and higher educational institutions of the country, and convinced by the happy results of past experience of the great value to China of education in American schools, the Imperial Government has the honor to state that it is its intention to send henceforth yearly to the United States a considerable number of students there to receive their education.³

In a note of the same date the Chinese Government informed the American Minister that "it has now been determined that from the year when the return of the indemnity begins 100 students shall be sent to America every year for four years, so that 400 students may be in America by the fourth year. From the fifth year and throughout the period of the indemnity payments a minimum of 50 students will be sent each year."⁴

The Chinese Government evidently regarded this act of the United States as a manifestation, as it was, of extraordinary friendliness and interest, and appointed a special envoy "to express the thanks of China for the action of the United States in reference to the indemnity." American ideas and ideals were rightly considered by the Chinese Government as equal, if not superior, to American dollars.

Our readers will be prepared by this brief introduction to appreciate the important statement issued by President Wilson on March 19, 1913,

² Foreign Relations of the United States (1908), p. 64.

³ *Idem.*, p. 68.

⁴ *Idem.*, p. 68. For the subsequent negotiations on this very interesting and important matter, see *idem*, pp. 69-75.

after conference with Secretary Bryan, which repudiates dollar diplomacy in the Far East, and by implication elsewhere, and which is not only in accordance with but restores the best traditions of American diplomacy.

We are informed that at the request of the last administration a certain group of American bankers undertook to participate in the loan now desired by the Government of China (approximately \$125,000,000). Our government wished American bankers to participate along with the bankers of other nations, because it desired that the good will of the United States towards China should be exhibited in this practical way, that American capital should have access to that great country, and that the United States should be in a position to share with the other Powers any political responsibilities that might be associated with the development of the foreign relations of China in connection with her industrial and commercial enterprises. The present administration has been asked by this group of bankers whether it would also request them to participate in the loan. The representatives of the bankers through whom the administration was approached declared that they would continue to seek their share of the loan under the proposed agreements only if expressly requested to do so by the government. The administration has declined to make such request because it did not approve the conditions of the loan or the implications of responsibility on its own part which it was plainly told would be involved in the request.

The conditions of the loan seem to us to touch very nearly the administrative independence of China itself; and this administration does not feel that it ought, even by implication, to be a party to those conditions. The responsibility on its part which would be implied in requesting the bankers to undertake the loan might conceivably go to the length in some unhappy contingency of forcible interference in the financial, and even the political, affairs of that great oriental state, just now awakening to a consciousness of its power and of its obligations to its people. The conditions include not only the pledging of particular taxes, some of them antiquated and burdensome, to secure the loan, but also the administration of those taxes by foreign agents. The responsibility on the part of our government implied in the encouragement of a loan thus secured and administered is plain enough and is obnoxious to the principles upon which the government of our people rests.

The Government of the United States is not only willing, but earnestly desirous, of aiding the great Chinese people in every way that is consistent with their untrammeled development and its own immemorial principles. The awakening of the people of China to a consciousness of their possibilities under free government is the most significant, if not the most momentous event of our generation. With this movement and aspiration the American people are in profound sympathy. They certainly wish to participate, and participate very generously, in opening to the Chinese and to the use of the world the almost untouched and perhaps unrivalled resources of China.

The Government of the United States is earnestly desirous of promoting the most extended and intimate trade relationships between this country and the Chinese Republic. The present administration will urge and support the legislative measures necessary to give American merchants, manufacturers, contractors, and engineers the banking and other financial facilities which they now lack, and without which

they are at a serious disadvantage as compared with their industrial and commercial rivals. This is its duty. This is the main material interest of its citizens in the development of China. Our interests are those of the open door — a door of friendship and mutual advantage. This is the only door we care to enter.

It is impossible to read this calm and measured statement without a thrill at the restoration and reaffirmation of policies which in the past have made the American name known and respected in the uttermost parts of the earth. President Wilson and Secretary Bryan are as desirous as any of their predecessors to advance the industry and commerce of the United States, but they are unwilling to single out groups of interests for preferential treatment, and they are deeply solicitous that American dollars may not directly or indirectly carry in their trail danger to the independence or freedom of action of a great and struggling nation, with which we have always sympathized and which we desire to see both happy and prosperous at home and respected as an independent Power abroad.

The turn of affairs in China is a source of gratification to the American people, who justly see in the republican form of government the triumph of those principles of self-government and that form of government which they proclaimed in the last quarter of the eighteenth century and to which they are unalterably attached. "The awakening of the people of China," to quote the exact language of the statement, "to a consciousness of the possibilities under free government is the most significant, if not the most momentous, event of our generation. With this movement and aspiration the American people are in profound sympathy. They certainly wish to participate, and participate very generously, in opening to the Chinese and to the use of the world the almost untouched and perhaps unrivalled resources of China;" but President Wilson and Secretary Bryan are, it is to be hoped, unalterably opposed to a policy which may be ruinous to China's best interests and which is certainly opposed to American traditions, for they solemnly declare that the government of the United States is not only willing, but "earnestly desirous of promoting the most extended and intimate trade relationships between this country and the Chinese Republic. The present administration will urge and support the legislative measures necessary to give American merchants, manufacturers, contractors, and engineers the banking and other financial facilities which they now lack, and without which they are at a serious disadvantage as compared with their industrial and commercial rivals.

This is its duty. This is the main material interest of its citizens in the development of China. Our interests are those of the open door—a door of friendship and mutual advantage. This is the only door we care to enter."

Immediately upon the publication of President Wilson's statement the American bankers interested in the Six-Power loan issued a statement which, by reason of its importance and in fairness to them should be quoted. It therefore follows in full:

The American group, consisting of J. P. Morgan & Co., Kuhn, Loeb & Co., the First National Bank and the National City Bank, was formed in the spring of 1909 upon the expressed desire of the Department of State that a financial group be organized to take up the participation to which American capital was entitled in the Hukuang Railway loan agreement then under negotiation by the British, French and German banking groups.

This group thus became interested in Chinese loan matters, not primarily for its own profit, but for the purposes indicated by President Taft and Secretary Knox. As stated in President Taft's message to Congress of December, 1909, these purposes, in effect, called for the co-operation of the bankers as the "indispensable instrumentality" which the American Government needed to enable it to "carry out a practical and real application of the open door policy." The Department of State considered that American co-operation with the banking groups of the several great Powers enabled the United States to exercise a practical voice in China's affairs and constituted the best guarantee for the preservation of China's integrity.

In pursuance of the policy so advocated, the American group, with the Administration's approval, entered into an agreement with the British, French and German groups for the purpose of rendering financial assistance to China. In February, 1912, these four groups, at the request of their respective Governments and with the consent of the Chinese Government, admitted Russian and Japanese financial groups to the negotiations for the reorganization loan, thus constituting what has since been known as the six Power group.

Following the revolution and despite the fact that the authority of the new republic had not been generally accepted, the American group joined with the other groups in making to the provisional Government substantial advances to enable it more firmly to establish its authority and to restore normal conditions throughout the country.

Meanwhile there had been in negotiation, during a period of many months, a loan agreement which, in its general terms, appeared last month to meet the approval of the six Governments, of their banking groups, and the Chinese Government, and to be ready for signature.

These terms were intended to cover two points. The first was to enable the Chinese Government to reorganize its administration on an effective modern basis, to pay off its large outstanding debts and build up Chinese credit. The second was to protect the interests of American and European investors. For such protection, in the judgment of the Governments and the groups, the only method was to insure, despite any possible recurrence of political unrest in China, the proper expenditure of the funds

loaned to China and to safeguard the handling of the revenues pledged for the principal and interest on the bonds.

As announced in the statement given to the press yesterday, the present Administration at Washington, with a desire to be of assistance to China and to promote American interests in the Far East, has decided that these purposes may better be served by the adoption of a different and independent policy. As the American group had been ready to serve the Administration in the past, irrespective of the heavy risks involved, so it was disposed to serve the present Administration if so requested. But deferring to the policy now declared, the group has withdrawn entirely from the Chinese loan negotiations and has so advised the European and Japanese banking groups.

**THE FUR SEAL CONVENTION AND THE FIVE-YEAR CLOSED SEASON
IMPOSED BY CONGRESS**

The Government of the United States after urging in vain for upwards of twenty years upon the other governments concerned the necessity for prohibiting pelagic sealing by an international agreement in order to protect and preserve the fur seal herds, finally, after difficult and protracted negotiations, prevailed upon Great Britain, Japan, and Russia to enter into the North Pacific Sealing Convention of July 7, 1911,¹ by which it is agreed that the citizens and subjects of these four Powers shall be prohibited from engaging in pelagic sealing for a fixed period of fifteen years, and for so long thereafter as by the mutual consent of the parties, the convention continues in force. In order to secure the adherence of Great Britain and Japan to this convention, it was necessary for the United States and Russia, as the owners of the breeding grounds to which the only two fur seal herds of any present importance resort, to agree to share in certain proportions and under certain conditions, with Great Britain and Japan, the annual proceeds of the business derived from the land killing of fur seals on the breeding grounds belonging to the United States and Russia. This agreement, so far as it concerns the United States, is contained in Article X of the convention which reads as follows:

The United States agrees that of the total number of sealskins taken annually under the authority of the United States upon the Pribilof Islands or any other islands or shores of the waters mentioned in Article I subject to the jurisdiction of the United States to which any seal herds hereafter resort, there shall be delivered at the Pribilof Islands at the end of each season fifteen per cent (15%) gross in number and value

¹ Printed in SUPPLEMENT, Vol. 5, p. 267.

thereof to an authorized agent of the Canadian Government and fifteen per cent (15%) gross in number and value thereof to an authorized agent of the Japanese Government; provided, however, that nothing herein contained shall restrict the right of the United States at any time and from time to time to suspend altogether the taking of sealskins on such islands or shores subject to its jurisdiction, and to impose such restrictions and regulations upon the total number of skins to be taken in any season and the manner and times and places of taking them as may seem necessary to protect and preserve the seal herd or to increase its number.

In order to give effect to certain provisions of this convention Congressional legislation was necessary, and for that purpose Congress enacted a law which was approved on August 24, 1912,² and which, in addition to the necessary provisions for carrying out the treaty obligations, provided further in section 11 thereof "That from and after the approval of this Act all killing of fur seals on the Pribilof Islands, or anywhere within the jurisdiction of the United States in Alaska, shall be suspended for a period of five years, and shall be, and is hereby, declared to be unlawful;" etc.

Prior to the passage of this Act, the President in a message to Congress dated August 14, 1912, strongly urged the inadvisability of enacting legislation, the effect of which was to require this government to suspend the killing of surplus male seals on land, before it has been actually proved by the test of experience and scientific investigation that such suspension of killing was necessary for the protection and preservation of the seal herd, as contemplated by the proviso of Article X of the convention. He pointed out that "the other governments interested might justly complain if this government, by prohibiting all land killing, should deprive them of their expected share of the skins taken on land, unless we can show, by satisfactory evidence, that this course was adopted as the result of changed conditions, justifying a change in our previous attitude on the subject." (See President's message printed, page 345.)

The reason that the President signed the Act notwithstanding its provisions prohibiting land killing, which were adopted by Congress in opposition to the recommendations in his message above mentioned, was stated by the President in a subsequent message on the same subject to Congress under date of January 8, 1913, as follows:

I refrained from vetoing it because at that time several thousand sealskins had already been taken on the islands and were ready for distribution in accordance

² Printed in Supplement to this JOURNAL, page 140.

with the requirements of the treaty, so that the suspension of land killing would not actually become effective until the following year, and I was satisfied that the information resulting from a study of the condition of the herd during the past summer would put this Government in possession of facts which would either lead to the amendment of the act at this session of Congress, or enable this Government to justify a temporary suspension of land killing; and apart from this particular provision, the act was needed to give effect to our treaty obligations.

The purpose of this later message was to ensure a re-examination by Congress of the prohibition against all land killing for a period of five years, and to secure the repeal of that prohibition before it actually became effective, if upon such re-examination it should appear that the suspension of land killing was not necessary for the protection and preservation of the herd within the meaning of the treaty stipulations. In this message the President called attention to the fact that under the operation of the Fur Seal Convention during the past year the condition and size of the herd had improved to an extent which would seem to indicate that there was no necessity, and therefore no justification, for the suspension of all land killing of male seals as required by the Act under consideration. This statement was based upon information derived from the reports of the government officials in charge of the American herd during the past season, which information is stated as showing not only that there had been in one season under the operation of this convention an increase of at least 75,000 seals in the size of the herd, but also that a large part of this increase consisted of female seals upon which the future increase of the herd depends. The message recognizes the necessity for prohibiting absolutely the killing of any female seals, and the importance of setting aside annually an adequate number of male seals for breeding purposes, but it points out that the preservation of the herd does not require the protection of surplus male seals not needed for breeding purposes. On this point the following extract from the message should be read:

Owing to the polygamous habits of the seals, the increase in the number of these surplus bachelor seals can in no conceivable way increase the birth rate or the reproductive capacity of the herd. Seals of this class contribute nothing to the welfare of the herd, and in some ways they are a distinct detriment as a disturbing element on the rookeries and as consumers of food, which is bound to become scarcer as the size of the herd increases. These nonbreeding males, therefore, are of no value as members of the herd, except to furnish skins for the market in place of those heretofore taken by pelagic sealers, and in this connection it should be noted that the value of their skins for commercial purposes diminishes after they are 4 years old and ceases altogether after the age of 5 or 6.

The message then deals with the necessity imposed by the treaty upon the United States of securing annually from the herd for Great Britain and Japan the share of its annual increase to which they are entitled, and in this connection the President states in the message that:

It is well understood by all the parties in entering into this convention that the result aimed at was to increase the annual reproductive capacity of the herd, so that a larger number of sealskins might be taken each year for commercial purposes without injury to the welfare of the herd.

For these reasons the President reaches the conclusion, as stated in his message, that the United States is in honor bound under this convention to permit the killing annually for commercial purposes of male seals not required as a reserve for breeding, before they have passed beyond the age when their skins cease to have a commercial value.

The message also deals with the argument which has been advanced in the discussion of this question in Congress that in addition to the right reserved to the United States of restricting land killing when necessary for the protection and preservation of the herd, the United States also has an absolute right arbitrarily to suspend all land killing because of a provision in the convention requiring the United States to pay annually \$10,000 to Great Britain and Japan in lieu of their share of skins during the years when no land killing is allowed. This provision, the message points out, has been erroneously interpreted as fixing a measure of damages to be paid to the other parties during any year when the United States prohibited land killing, but the message shows that it is evident from an examination of the other provisions of the same clause of the convention that these \$10,000 payments cannot be, and were not intended to be, regarded as a measure of damages because Great Britain and Japan are required to repay them to the United States with interest at 4% out of the proceeds of their share of the skins taken whenever land killing is resumed, and that a payment which is subsequently to be refunded clearly is not a measure of damages. The real purpose of this provision requiring \$10,000 payments when land killing is suspended is shown to have been the desire of the other parties to the treaty to prevent the suspension of land killing by executive action unless Congress was prepared to appropriate the money necessary for making such payments, it being assumed that the necessity for adopting legislation providing for these payments would lead to a careful investigation as to whether or not the actual condition of the herd warranted

a total suspension of land killing, and that the appropriation would not be made unless the investigation produced satisfactory evidence that such suspension of killing was absolutely necessary within the requirements of the treaty.

For these reasons the message recommends to Congress the immediate consideration of whether or not the complete suspension of land killing imposed by the Act is necessary for the protection and preservation of the herd, and for increasing its numbers within the meaning and for the purposes of the convention, because if no actual necessity is found for such suspension, then it is not justified under the convention, and the Act should be amended accordingly. The message concludes with this statement:

I also wish to impress upon Congress that, as stated in my former message on this subject, it is essential in dealing with it not only to fulfill the obligations imposed upon the United States by the letter and the spirit of the convention, but also to consider the interests of the other parties to the convention, for their co-operation is necessary to make it an effective and permanent settlement of the fur-seal controversy.

The arguments advanced by the President in this message seem unanswerable, and unless the land killing of surplus male seals is permitted or it should appear upon a re-examination of the question that conditions have so changed as to justify a change in the previous attitude of this government upon the subject, a serious question may arise involving the good faith of the United States in observing its treaty obligations with Great Britain and Japan.

MESSAGE OF THE PRESIDENT OF THE UNITED STATES

To the Senate and House of Representatives:

Under the fur-seal convention entered into by the United States with Great Britain, Japan, and Russia on the 7th of July, 1911, which was approved by the Senate on July 24, 1911, and ratified on December 12, 1911, this Government agreed to pay the sum of \$200,000 to Great Britain and the sum of \$200,000 to Japan when the convention went into effect; and in my message to Congress of December 7, 1911, the attention of Congress was especially called to the necessity for legislation on the part of the United States for the purpose of fulfilling the obligations assumed under the convention. In view of the omission of Congress up to the present time to adopt any legislation to carry out the obligations of this Government under this convention, it becomes incumbent upon me again to call the subject to the attention of Congress and to urge the importance of enacting at the earliest possible moment, and at this session of Congress, the legislation necessary to enable this Government to make the payments to Great Britain and Japan as required by this convention,

and also to fulfill its other obligations thereunder in so far as legislation is necessary for that purpose.

The international conference at which the convention under consideration was agreed upon was held at the urgent invitation of the United States, and the acceptance of that invitation by the other parties was secured only after protracted negotiations and at the repeated request of the United States, and, notwithstanding these circumstances, the United States is now the only one of the four parties to the convention which has failed to adopt any legislation for the purpose of giving effect to the obligations imposed by the convention.

In this connection I desire also to call briefly to the attention of Congress the question of the policy to be pursued by this Government with reference to the regulation of the fur-seal herds within the jurisdiction of the United States. The convention reserves to the United States the right at any time and from time to time to suspend altogether the taking of sealskins on the islands and shores within its jurisdiction, and to impose such restrictions and regulations upon the total number of skins to be taken in any season and the manner, times, and places of taking them as may seem necessary to protect and preserve the seal herd or to increase its number. This, therefore, is a subject which may properly be dealt with by Congress, and it is essential in dealing with it not only to fulfill the obligations imposed upon the United States by the letter and the spirit of the convention, but also to consider the interests of the other parties to the convention, for their co-operation is necessary to make it an effective and permanent settlement of the fur-seal controversy.

Ever since the question of land killing of seals was subjected to scientific investigation, soon after the fur-seal controversy arose nearly 25 years ago, this Government has invariably insisted throughout the protracted and almost continuous diplomatic negotiations which have ensued for the settlement of this controversy that the progressive diminution of the herd was due to the killing of seals at sea, and that if pelagic sealing was discontinued the polygamous habits of the seals would make it possible to kill annually on land a large number of surplus males without detriment to the reproductive capacity of the herd and without interfering with the normal growth of the size of the herd. The position thus taken by the United States has always been put forward and relied on by the United States in urging that an international agreement should be entered into prohibiting pelagic sealing; and it is obvious that one of the considerations which induced Great Britain and Japan to enter into this convention prohibiting their subjects from pelagic sealing was the expectation that the position thus taken by the United States was well founded, and that the skins falling to the share of those Governments from the land killing of seals, as provided for in this convention, would compensate them for abandoning the taking of sealskins at sea.

With these considerations in mind, I feel called upon to suggest the inadvisability of adopting legislation, the effect of which is to require this Government to suspend altogether the killing of seals on land before it has actually been proved by the test of experience and scientific investigation that such suspension of killing "is necessary to protect and preserve the seal herd." The other Governments might justly complain if this Government should deprive them of their expected share of the skins taken on land by prohibiting all land killing unless we can show by satisfactory evidence that this source was adopted as the result of changed conditions which justify a change

in our former attitude on the subject. In this connection it should be noted that, since the fur-seal business has been taken over by the Government and no private interests are now concerned in making a profit out of it, there is no urgent necessity for imposing by legislation stringent limitations upon land killing. Legislation on this subject, therefore, may well be postponed until after the enactment of legislation necessary to give effect to our obligations under this convention.

It must also be remembered that this convention runs for a fixed period of only 15 years and can be terminated at the end of that period by any of the parties, so that it is of the utmost importance that this Government should deal with this subject not only in a way which will satisfy the other parties interested that they are receiving their fair share of the increase of the herd resulting from the cessation of pelagic sealing but also in such a way as to enable this Government to demonstrate that the killing of the surplus male seals on land is not detrimental to the welfare of the herd. It is evident, however, that this question can not fairly be tested if land killing and pelagic sealing are both prohibited at the same time, and it would be most unfortunate if we should lose the opportunity, which is now presented for the first time by virtue of this convention, of demonstrating by the test of actual experience the soundness of the position maintained by us throughout the controversy, and upon the soundness of which depends the permanent solution of this question in the manner provided for in this convention.

Wm. H. TAFT.

THE WHITE HOUSE, *August 14, 1912.*

EX-PRESIDENT TAFT

Whether or not diplomatic agents should be recommissioned by the new sovereign, or whether or not the accession of the sovereign be looked upon as an international event, the passing of a President of the United States and the advent of his successor are purely domestic matters and have no necessary effect upon foreign affairs or diplomatic agents of the United States. The nation is one and the same and its diplomatic agents, after as before, represent the nation, not the President by whom they have been appointed, subject to the advice and consent of the Senate.

President Taft has been succeeded by President Wilson; the one has become a private citizen; the other chief magistrate, and the latter will in turn give way some years hence to President _____. As it has been epigrammatically, if not quite accurately, said: President Taft drove up Pennsylvania Avenue with Professor Wilson and in a couple of hours President Wilson drove down Pennsylvania Avenue with Professor Taft.

The question has often been asked: What shall we do with our ex-Presidents? President Taft has answered this by accepting a professor-

ship of international and constitutional law in Yale, of which he is the most conspicuous graduate. Others have retired to private life and have lived in dignified retirement, and have busied themselves but rarely, if at all, with public affairs. Mr. John Quincy Adams entered the lower House of Congress and is best remembered for his services in this body. Mr. Johnson ended a stormy career in the Senate. Mr. Arthur made arrangements to practise law. Mr. Cleveland actually did practise law during the interval between his first and second presidency. Mr. Benjamin Harrison returned to the Bar and represented Venezuela before the Venezuelan Arbitration. Mr. Cleveland after his second presidency retired to Princeton and was associated with its university. Colonel Roosevelt entered journalism. The ex-President is a private citizen, distinguished among his fellows by his former greatness, but still a private citizen.

Mr. Taft has returned neither to the Bar nor to the Bench, but has dignified the profession of teaching by accepting the Kent professorship at Yale. He is to be congratulated upon his choice, and the American people wish him years of usefulness amid new and yet familiar scenes, for he has always been, as now, a loyal and devoted son of Yale.

THE JAPANESE REVIEW OF INTERNATIONAL LAW

A recent article in the January and February numbers of the Japanese *Review of International Law and Diplomacy* makes a peculiar appeal to the sympathy of American readers. Before discussing it, however, it will be of interest to prefix a few words about the *Review* itself. Founded in 1902 as the organ of Japanese professors, it has entered upon the eleventh year of its existence. With the October, 1912, number, which begins the eleventh volume, it would seem to have entered upon a new and larger career. Previous to this issue it was called the *Review of International Law*. With the October number it has enlarged its contents so as to include the subject of Diplomacy, and the table of contents, printed in English, enables the reader to note by comparison with previous years that its scope, as well as its contents, is materially enlarged. It appears monthly with the exception of two months during the summer, so that the volume of the year contains ten numbers.

An examination of the table of contents of the last two numbers which have been received (January and February) shows the interesting

subjects treated, but the fact that it is in Japanese makes it, as it were, a sealed book, except for an occasional article which appears in English. The contents of the January number are:

1. Hugo Grotius (an article in Japanese and English, with portrait of Grotius as frontispiece).
2. International Law in Japan.
3. Carnegie Endowment for International Peace.
4. On the Panama Canal.
5. Great Powers from the point of view of International Law.
6. Notes on European Diplomatic Affairs.
7. On the Bagdad Railway.
8. Notes on American Affairs.
9. Japan and the United States of America, an Instance of the American Protection of Japanese Interests.

Documents, correspondence, etc.

The February number:

1. Life of Richard Zouche (with an excellent portrait of Zouche).
2. On the Conflict of Laws.
3. Great Powers from the point of view of International Law.
4. Conveyance of Passengers and Baggage in the Russo-Japanese Through Communication.
5. Position of U. S. A. in the Panama Canal Zone.
6. Annexation of States, Territories, Authorities and Inhabitants.
7. On the Bagdad Railway.
8. Land-Tenure Bill of the California State Legislature.
9. Notes on American Diplomatic Affairs.
10. Notes on European Diplomatic Affairs.
11. Japan and the United States of America, an Instance of the American Protection of Japanese Interests.

Documents, correspondence, etc.

Clearly this is a journal to be reckoned with, and it is a pity that the language in which it is printed deprives publicists generally of the profit they would no doubt receive from a careful reading and study of its contributions. The editor-in-chief is the well-known Sakuyé Takahashi, professor at the University of Tokyo, associate of the Institute of International Law, and author of the well-known *International Law applied to the Russo-Japanese War*.

The articles to which the reader's attention is particularly called are those in the January and February, 1913, numbers written by the dis-

tinguished editor-in-chief on "Japan and the United States of America." It would be unbecoming in an American to set forth the services which his country rendered to Japan during the recent life-and-death struggle with Russia. It is, however, deeply gratifying to see them appreciated in such glowing terms by the enlightened editor-in-chief, who has visited this country and knows from personal observation the respect in which his country is held and the friendship for it which pervades all classes of our people. Professor Takahashi describes in the two articles what he considers to be a few of the more noteworthy instances in which the diplomatic officers of the United States rendered real and highly appreciated services in enabling Japanese subjects to leave Russian territory during the war. Professor Takahashi considers the present moment as opportune to call attention to these services. In the second paragraph of the first article he says:

At this time it is fitting to bring to light what the United States did for Japanese subjects in protecting them during the said war. This may be done without irritating any country of the world. On the contrary, it may prove how benevolent the United States is, and how righteous she is from the point of view of international law, in protecting the Japanese non-combatants who were in Russian territories and in the districts occupied by the latter.

Again, in a later passage of the first article he says: "Thus nearly all of the subjects in Manchuria returned to Japan under the protection of the United States."

In the second article he quotes an official despatch regarding the action of the United States in helping Japanese subjects to reach Berlin as saying: "Our thanks are especially due to the United States Ambassador to Russia for all his friendly efforts and care, without which none of the refugees would have been able to reach Germany in safety."¹

The concluding paragraphs of this little article are quoted in full:

Above are given only a very few of the many instances that might be cited to set forth the great and unceasing efforts exerted by the United States for the protection of Japanese interests during the war. To attempt to enumerate them all, so as to show Japan's indebtedness to the United States, would require volumes; the single instance above given serves well as an illustration.

No judicious reader could possibly glance over these pages without being made aware of the essay's intention, deeper than it may apparently seem, to bring to light the friendly attitude which the United States Government never failed to preserve during the withdrawal of the Japanese subjects who were found in Russian territories and in the land occupied by Russia. It has been an earnest endeavor to make both

¹ *Revue de Droit International et Diplomatique*, Vol. XI, No. 5, p. 5.

the American and Japanese public well acquainted with facts hitherto comparatively little known. Peace among civilized nations must be the pedestal upon which international intercourse is to be placed; and if any two friendly nations breed estrangement, however slight, because of a sensational and groundless misunderstanding, fermented among the uneducated classes, then the more refined and the highly educated should be largely held responsible for the consequences. What perhaps seems a too minute exposure of details illustrative of the Americo-Japanese friendship, surely will not be regarded as casual, when viewed in such a light.²

The spirit which has animated Professor Takahashi is evident from the last quotation, and no greater service can be rendered by the enlightened of both countries than to call attention to the friendly relations which always have existed between Japan and the United States and which do now exist, notwithstanding temporary differences which are given by interested parties an importance which they do not deserve and which is wholly out of keeping with the best interests of the two countries. It is to be expected that from time to time there will be a clash of policies, as differences of opinion always arise in the foreign intercourse of nations, but, if the unbroken friendship between Japan and the United States be borne in mind and if the more refined and highly educated classes do their duty as pointed out to them by Professor Takahashi, and if, furthermore, the responsible officials of both governments are animated by the generous and broad-minded sympathy which pervades Professor Takahashi's article, we need have no fear of the future. Such articles as these should be widely read, for they make for good understanding and international peace. The AMERICAN JOURNAL OF INTERNATIONAL LAW congratulates the Japanese Review and the changes which have been made and which cannot fail to increase its usefulness and, on behalf of American publicists, the JOURNAL thanks Professor Takahashi and his colleagues for their generous appreciation of the services which the United States was enabled to render to Japan in the trying circumstances of the Russo-Japanese war.

JOHN BASSETT MOORE, THE NEW COUNSELOR FOR THE DEPARTMENT OF
STATE

The official announcement that the Honorable John Bassett Moore, professor of international law and diplomacy in Columbia University, has accepted the position of Counselor in the Department of State is an

² *Revue de Droit International et Diplomatique*, Vol. XI, No. 5, pp. 8-9.

item of interest to the members of the American Society of International Law, of which Mr. Moore was one of the founders, and to the readers of the JOURNAL, of which Mr. Moore is an editor, and a source of congratulation to the public at large, both at home and abroad, as he is without question not only the very head and front of American publicists, but one of the most distinguished authorities and writers on international law in this large and important field of human knowledge.

Professor Moore is qualified for this, or indeed for any, position in the Department of State, both by practical experience and by theoretical study. Born in Delaware in 1860, he entered the Department of State in 1885, was Third Assistant Secretary of State from 1886 to 1891, and Assistant Secretary of State during the trying period of the war with Spain, from April to September, 1898, and was secretary and counsel of the Spanish-American Peace Commission at Paris in 1898. He was secretary to the Fisheries Conference, 1887-1888, and to the Conference on Samoan affairs in 1887. He was agent of the United States before the United States and Dominican arbitral tribunal in 1904, delegate of the United States to the Fourth International American Conference at Buenos Aires in 1910, delegate of the United States to the Congress of Jurists for the codification of international law, held at Rio de Janeiro in July, 1912, and was recently appointed member of the Permanent Court of Arbitration at The Hague.

His theoretical qualifications for the position are evidenced by the fact that he has been professor of international law and diplomacy at Columbia University from 1891, when he resigned the position of Third Assistant Secretary of State to accept this chair, which he still holds, and by a long list of contributions to those phases of international law in which he is particularly interested. Of a technical nature may be mentioned his *Report on Extra-territorial Crime* (1887), his *Report on Extradition* (1890), his *Treatise on Extradition and Interstate Rendition*, 2 volumes (1891), and the *American Notes to Dicey's Treatise on the Conflict of Laws* (1896). His elaborate *History and Digest of International Arbitrations*, 6 volumes (1898), is the standard work on this subject which has hitherto appeared in English and will be only replaced by a more elaborate work on all known instances of arbitration, which he has undertaken to prepare for the Carnegie Endowment for International Peace. His monumental *Digest of International Law*, 8 volumes (1906) is, like his *History and Digest of International Arbitrations*, an official publication of the government. It is the only work of its kind, is a

storehouse of information and precedent, and, notwithstanding its title "Digest," it is in reality an elaborate and authoritative treatise on international law.

Professor Moore has from time to time delivered valuable addresses which have appeared in pamphlet form, and has published two works of modest proportions which appeal to the general reader: *American Diplomacy, its Spirit and Achievements* (1905) and *Four Phases of American Development* (1912).

In addition to this imposing list of publications, Professor Moore has edited the works of James Buchanan, 12 volumes (1908). Professor Moore's various contributions to international law cannot be too highly praised. As Professor Nys, the distinguished Belgian publicist, has himself said: "On ne saurait dire trop de bien de toutes les œuvres du savant juriseconsulte."

President Wilson and Secretary Bryan are to be congratulated for persuading him to quit his professorship at Columbia to assume the duties of Counselor in the Department of State, for his mere presence in the Department will be a guarantee that the best traditions of the United States are to govern our international relations, and that the newer problems as they arise will be decided according to precedent and in a way to enhance the international prestige of the United States, of which we are justly so proud.

THE SUPPRESSION OF THE OPIUM TRAFFIC

The last two numbers of this JOURNAL contained articles on the International Opium Conference held at The Hague during the winter of 1911-12. The first article outlined the actions which had been taken since the adjournment of the International Opium Commission by the several governments party to that commission to put into force effective national laws for the suppression of the abuses connected with the over-production and traffic in opium; while the second article was descriptive of the International Opium Conference and analytical of the convention signed by the delegates thereto.

The international movement for the suppression of the opium traffic initiated by the United States in the interest of China has developed from a consultation with four or five of the larger western Powers having territorial relations with that country to a movement which now em-

braces the entire civilized world. During this development the original object sought by the United States — namely, to assist China to bring her opium evil to an end — has grown somewhat obscure to the public mind. It should be recalled, therefore, that in the spring of 1908, when the executive called the attention of the Congress to the diplomatic action of the United States Government to bring about conjoint action for the suppression of the opium evil, it was stated that the action thus inaugurated was in conformity with the established policy of our government, expressed in the treaty with China concluded November 17, 1880, by which the Governments of China and the United States mutually agreed that "Citizens of the United States shall not be permitted to import opium into any of the open ports of China, to transport it from one open port to any other open port, or to buy and sell opium in any of the open ports of China"; and that this treaty was followed by the Act of Congress of February 23, 1887, prohibiting citizens of the United States from engaging in the opium trade with China under heavy penalties.

The diplomatic intervention of the United States for the suppression of the Far Eastern opium traffic was based on a consistent policy which had been followed from the earliest contact of its citizens with Far Eastern countries. The United States was almost alone in agreement with those countries that the opium traffic should be suppressed. The attitude of this government, however, had little effect except to restrain American citizens, for up to 1906 the opium evil in China had grown to an enormous extent. This may be best illustrated by quoting from a high authority:

I shall not yield to the temptation to describe the effects of opium in China. The leaders of the Chinese people look upon it as a dangerous foe to our very existence as a nation. Every instinct of self-preservation cries out against it. The past few years have brought some strange and notable apologists for opium — some strange and notable apologists for China as an opium-using country. Would that we Chinese, who are best in position to know the facts, could follow them with conviction! Would that we could dispel the sternness of the facts with this softness of speech!

But go with me, gentlemen of this Commission, over that broad and once fair stretch of Western China, where the ravages of the curse have been most evident — the provinces of Szechwan, Yünnan, Kweichow, Kansu, and Shensi — an area comprising a large proportion of the eighteen provinces. Visit the dismal and wretched hovels, which, were it not for opium, would be happy homes; see the emaciated, depraved multitude of victims to this vice; observe the abject poverty — and notice for the cause of it all the wide fields once covered with waving gold of ripening grain now given over to the cultivation of the poppy. Read what Lieutenant-Colonel

Bruce says on Kansu: "One blot, and that no small one, lies on the people of Western Kansu. It is that men and women are, to a fearful extent, habitual and confirmed smokers." Monseigneur Otto, Catholic Bishop of Kansu, who has spent thirty years of his life in China, reckons six men out of every eight of the population as confirmed in the habit.

The economic burden imposed upon China by the use of opium has now become almost unbearable. As is shown in our report, a conservative estimate of the annual production of native opium for 1906 is 584,800 piculs; this we may value at Tls. 220,000,000. To this must be added for imported opium Tls. 30,000,000, taking the value of the importation for 1905; this gives us a total expenditure in cash on the part of the Chinese for opium of Tls. 250,000,000. The land now given over to the production of opium, were it planted with wheat or other more useful crops, would yield an annual return of, let us say, at least Tls. 150,000,000. This sum, added to the loss of Tls. 250,000,000 mentioned above, means that the cultivation of opium costs the nation Tls. 400,000,000 a year. To estimate the loss to the country in the earning capacity of the victims of the opium habit is more difficult. Our investigations have convinced us that there are 25 million men in China addicted to the use of opium. This number, unfortunately, includes many from among the more highly productive classes; but if we suppose their average earning capacity, were they not addicted to the habit of opium, to be one-fifth a tael a day, and that this is reduced one-quarter by their use of opium, we have here a daily loss to the nation of Tls. 1,250,000, or an annual loss of Tls. 456,250,000. If there is added to this the items which I have mentioned above, we have a total annual loss to China of Tls. 856,250,000. It is needless for me to call your attention to how ill-prepared we are as a people at the present stage of our industrial development to bear such a burden as this. No account is here taken of the capital loss involved.

This economic loss affects not only China but all of the leading nations of the world. We live in the era of improved transportation, which means an era of increased foreign trade. Within the past 28 years the world's foreign trade has grown from Gold \$2 1-2 *per capita* to Gold \$14. While China's trade has been backward, she has not failed to feel the impulse of this world movement. In 1867 when the Chinese customs statistics assumed their present shape and furnished the first data for comparison with the present, the value of China's imports was less than 69 1-3 million taels; in 1905 it was over 447,000,000 taels, an increase of more than sixfold; and yet the foreign trade of China is still lamentably small. The imports of China *per capita* are about 2s. 5d., while those of Japan are 15s. 10d.—nearly seven times as much, and of the United States about 30 times as much *per capita*. There is no part of the world in which there is a field for such an enormous extension of foreign trade as is presented to-day in China. In fact, who can estimate the influence upon the trade of the world when China comes to her own commercially and industrially? If the world sold to each Chinese as much as it does to each Japanese, it would receive 3 billion taels annually from China.

The facts just stated are no exaggeration. The opium evil had not only permeated the hovel, but every government yamen in China, and the representatives of foreign governments continually found it difficult

to come to an agreement with Chinese officials on economic, social and diplomatic questions, or, where such agreements were arrived at on these questions, to secure their fulfillment. Dislike of the foreigner was almost universal, largely because of the "black poison" which the average Chinaman felt had been forced upon his country from outside sources. This outstanding difference between China and the western world is about to be obliterated. In a word, the Indo-Chinese opium traffic is at an end. To-day, China, encouraged by the diplomatic intervention of the United States and as a result of agreements made with the British Government, is at least seventy-five per cent free of her opium evil. The present situation is as follows:

As the result of the Chinese interpretation of the terms of the agreement between China and Great Britain of May 8, 1911, China has practically forbidden the importation of Indian opium, all the governors of the provinces having instituted such regulations in regard to the retail trade in the drug that the market for Indian as well as native opium is practically closed. It has resulted that some seventy million dollars worth of Indian opium is now in storage at Hongkong and Shanghai, on which the various foreign banks have advanced about fifty million dollars. Storage and insurance charges are heaping up. Therefore, the Indo-Chinese opium traffic has arrived at the critical point where it must be discontinued and the stocks of opium cleared off by some method. The first step to this end was the suspension by the Indian Government of all sales of opium for the China market, and the cutting down by one-third of the sales of opium to other Far Eastern countries, including the British Crown Colonies. There remains only the question of the disposition of the opium stocks at Shanghai and Hongkong. The difficulty in regard to this matter may be realized when it is understood that the International Opium Convention signed at The Hague last year practically closes the doors of every nation in the world to this low-grade opium. The opium merchants and bankers are threatened by ruin. The banks have made several efforts to open the China market to this opium by indirect pressure on Peking. These efforts have not been successful, and the American Government, in view of its treaty relations with China and its diplomatic position in regard to the opium trade, has instructed its diplomatic and consular officers in China to have nothing to do with the attempt of the bankers. Serious proposals are now being made that the Indian Government, which during the last five years has received a windfall of nearly seventy-five million

dollars from the enhanced price of Indian opium, should buy back from the merchants the stocks of opium now in their hands and destroy the drug. Should the present critical situation so eventuate, Commissioner Lin, who, by the seizure and destruction of twenty thousand chests of opium in 1837, brought on the so-called Opium War, would undoubtedly turn in his grave and sigh with satisfaction.

Quite apart from that aspect of the opium question as it affects China, the international side is interesting, for the International Opium Convention has, in addition to the original signatures, received the signatures of all the Latin American states but one, and, on December 17 last, Great Britain, one of the original signatories, signed on behalf of Canada, New Zealand, Australia, South Africa, and twenty-five Crown Colonies, dependencies and protectorates. In addition, most of the European countries have signed the instrument.

By the terms of the convention, if any civilized state had not signed the convention by the 31st of last December, it was incumbent upon the Netherland Government immediately to call a final conference of all the signatory Powers to assemble at The Hague to determine upon the deposit of ratifications of the instrument. That conference has now been summoned by the Netherland Government to meet at The Hague in June, and there is every reason to believe that when the conference assembles, it will be composed of representatives of every Power of America, Europe and Asia; that the convention will be amended and the time for the deposit of its ratifications decided upon. Thus, the original idea of the United States Government that four or five Powers should come to the assistance of China, has been enlarged and welded into a concrete agreement embracing all civilized states.

THE TREATY OF NOVEMBER 27, 1912, BETWEEN FRANCE AND SPAIN
CONCERNING MOROCCO

As pointed out in previous comments, the ambition of France has been for years past to acquire, and having acquired them, to consolidate its possessions in the north of Africa. The conquest of Algiers began in the thirties, and the vast extent of territory formerly subject to the Bey of Algiers is now a department of the republic. Tunis was acquired in 1881 and is under French protection. Finally, Morocco has been subjected to French domination, but only after a struggle which threatened at one time the peace of the world. There were several serious obstacles

in the way of absorbing Morocco. France and Great Britain were at loggerheads about the occupation of Egypt. Spain coveted Morocco and had obtained a firm foothold in certain parts of it. Germany, acting in its own behalf and in the interest of equal commercial opportunity for the nations at large, had to be reckoned with.

By the treaty of April 8, 1904, France withdrew objections to English activity in Egypt, provided it was given a free hand in Morocco. The interests of Spain were safeguarded and Spain was invited to adhere to the declaration of April 8, 1904, which it did on October 3, 1904.¹ The interests of France and Spain were defined in the so-called secret treaty of even date.² The way was therefore prepared for France to extend its influence in Morocco without obstruction from Great Britain, on the one hand, and Spain, on the other. Germany, however, insisted not merely on being consulted but in having its interests recognized, which it skilfully identified with those of the Powers. After protracted negotiations and much friction France succeeded, with the support of Great Britain, in concluding the convention of November 4, 1911,³ which, while guaranteeing the interests of Germany and of the Powers generally, removed German opposition to French action in Morocco. But a *modus operandi* had to be reached with Spain, as its interests in Morocco were material as well as historic, for without this complete understanding France would have been unable to render its protectorate over Morocco effective as far as Spain was concerned. Concession, tact, and the feeling that the preponderance of France was inevitable, led to the treaty of November 27, 1912, by which the two countries defined their spheres of influence, their respective rights in Morocco, and provided for arbitration of any disputes which might arise between them regarding the interpretation and application of the treaty.⁴

Without analyzing in detail the provisions of the treaty, it should be said that Article 1 recognizes Spanish influence within the sphere defined in Article 2, and that in Article 5 Spain agrees, in conformity with previous stipulations, neither to alienate nor to cede under any form, even temporarily, its rights in the whole or any part of the territory composing its zone of influence.

¹ For these important declarations see AMERICAN JOURNAL OF INTERNATIONAL LAW for 1912, SUPPLEMENT, pp. 26-30.

² For the text of this important document, see *idem*, pp. 116-120.

³ For the text of this important document, see *idem*, pp. 62-66.

⁴ For the text of this important document see SUPPLEMENT to this JOURNAL, p. 81.

The relations of France and Spain as regards the Spanish zone of influence are very skilfully arranged by Article 1 of the treaty, and Article 26 withdraws the intervention of the sultan under French control within the Spanish sphere. Thus "International agreements concluded in future by His Shereefian Majesty will not extend to the Spanish zone of influence except with the previous consent of the Government of His Majesty the King of Spain." As previously pointed out, differences arising between France and Spain concerning the interpretation of the present important treaty are to be arbitrated. This is provided for in Article 27, which by reason of its importance is quoted in full:

The convention of February 25, 1904, renewed on February 3, 1909, as well as the general convention of The Hague of October 18, 1907, will apply to differences which may arise between the contracting parties concerning the interpretation and the application of the provisions of the present convention, which may not have been settled through diplomatic channels. A *compromis* must be drawn up according to the rules of the said conventions unless it is dispensed with by express agreement at the time of the litigation.

Article 28 very properly provides that "all classes of treaties, conventions and former agreements which may conflict with the preceding stipulations are abrogated."

This comment leaves out of consideration the protocol attached to the treaty, which, however, is printed in the Supplement to the present number of the JOURNAL.

It would seem, therefore, that as a result of negotiations extending over years, France has succeeded in establishing its protectorate over Morocco with the consent of the Powers generally, and with the approval of Spain, whose special rights and interests are, however, satisfactorily recognized and adjusted. The price is the independence of Morocco, but the independence of a small state seems to be a matter of little or no concern to the Powers, provided they receive what is called, in the language of diplomacy, compensation. It is to be hoped that this high-handed procedure, for the chief party in interest — Morocco — consents to its annihilation under duress, will be justified, in so far as it can be justified, by good government in Morocco and the prosperity of its people.

CHANDLER P. ANDERSON

In the January, 1911, number of the JOURNAL attention was called to the appointment of Mr. Chandler P. Anderson as Counselor for the De-

partment of State, and the training and experience he had had in international affairs which justified the appointment. The change of administration on March 4, 1913, will, according to uniform precedent and practice, involve a change of the personnel of the State Department, at least of the higher officials appointed by the President and confirmed by the Senate. Mr. Anderson's successor has been announced and Mr. Anderson will shortly sever his connection with the Department of State. It will no doubt be a source of pleasure to the members of the American Society of International Law, of which Mr. Anderson has been treasurer since its organization in 1906, and to the readers of the *JOURNAL*, of which he is one of the editors, that he does not retire to private life, but that the government is to have the benefit of his services, for he has been appointed American member of the pecuniary claims tribunal between Great Britain and the United States, which it is expected will begin its labors in the month of May.

As Counselor for the Department of State, Mr. Anderson has been consulted in the negotiation of treaties and agreements, in the diplomatic negotiations relating to international differences, and in the proceedings taken in accordance with treaty stipulations. To give an idea of the extent and variety of his services it would be necessary to consider in detail the various questions of this nature which have arisen in the Department since his connection with it. This would, however, exceed the limits of an editorial comment. It is therefore only possible to mention some of the more important matters which were discussed and settled during his tenure of office and with which he is prominently and honorably identified. Some of these questions were of long standing and had been handled by Mr. Anderson as special counsel to Mr. Root when Secretary of State. Such, for example, were the delicate and complicated questions dealing with the preservation of the seal in Bering Sea, which resulted in the conclusion of the seal treaty with Great Britain of February 7, 1911, as preliminary to the North Pacific Sealing Convention between Great Britain, Japan, Russia and the United States of July 7, 1911, in which Mr. Anderson was one of the American representatives. Two other questions with which Mr. Anderson was connected as Counselor began under Mr. Root and were carried to completion under Mr. Knox: the treaty of commerce and navigation with Japan of February 21, 1911, and in the same way the treaty of February 25, 1913, between Italy and the United States amending Article 3 of the treaty of 1871. To the first of these the *JOURNAL* has already

devoted a special comment¹ congratulating the Department of State upon its success in settling satisfactorily the difficulties which had arisen between the two countries since the unfortunate school incident in San Francisco.² The treaty between the United States and Italy above referred to forms the subject of a special comment in the present issue of the JOURNAL.

It is, however, in connection with the settlement of the North Atlantic Fisheries controversy with which Mr. Anderson's name will be in time to come most closely associated. He was, it will be recalled, agent of the United States in the arbitration of this historic controversy, which was decided in part by the award of a temporary tribunal of the so-called Permanent Court of The Hague on September 7, 1910. Mr. Root's experience with the Alaska Boundary dispute showed him how easy it was to settle differences between nations when their relations were friendly and unruffled by untoward incidents, and how easily questions even of small moment assumed political importance and were difficult of adjustment in periods of storm and stress. On becoming Secretary of State he decided to open up and, if possible, to settle by diplomatic means the North Atlantic Fisheries controversy, as the friendly relations between Great Britain and the United States led him to believe that this question might be disposed of to the mutual satisfaction of both nations. He therefore opened up the question in October, 1905, and after much discussion between the two governments and the failure of diplomacy to compromise apparently irreconcilable differences of opinion, the special agreement of January 27, 1909, was negotiated, by which the questions at issue were submitted to arbitral determination. Throughout this period Mr. Anderson acted as special counsel to Mr. Root and was, as has been said, agent of the United States in the arbitration which took place at The Hague in 1910. The temporary tribunal decided most of the questions. It made a series of recommendations on Question 1 and Question 5, and it was the good fortune of Mr. Anderson as Counselor for the Department and as special representative of the United States to negotiate the North Atlantic Fisheries agreement of July 20, 1912,³ which secured the adoption of these recommendations with

¹ See AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 5, p. 442.

² See editorial in this JOURNAL, Vol. I, p. 150, and address of Honorable Elihu Root, Proceedings for 1907, page 43, and this JOURNAL, Vol. I, page 273.

³ See editorial comment and text of this important treaty in this JOURNAL for January 1913, p. 140 and SUPPLEMENT, p. 41.

certain important modifications. A distinguished French publicist, Professor Jules Basdevant, states after a careful and minute examination of the contention of the United States under Question 1, that the convention of 1818 established an international servitude, that "after having decided that no servitude was constituted and that the competence of the local sovereign to regulate remains intact, it [the Hague Tribunal] recommends the two Powers to agree to establish that in the future the regulations made by Great Britain shall only become, if they are criticized by the United States, binding upon American fishermen when a mixed commission shall have recognized that they are in conformity with the provisions of the treaty of 1818. That is, after having admitted the competence of Great Britain and its right to exercise this competence independently on its own responsibility, to invite this Power only to exercise this competence under the control of this commission. Practically that is, after having rejected the thesis of the United States, to consecrate it under the form of a recommendation.⁴ Professor Basdevant concluded that "after having recognized that the treaty of 1818 did not create an international servitude, but a simple obligation of state to state, recommends the parties to transform it into a servitude."

The agreement of July 20, 1912, negotiated by Mr. Anderson, secures to the United States the advantages to his country which would have followed from a recognition of the principle of law for which the United States contended at the arbitration. To have conducted the negotiations leading to this result and to have achieved it is a sufficient claim to distinction for any one man.

APPOINTMENTS TO THE DIPLOMATIC SERVICE

From time to time regret is expressed in the press that the President and Secretary of State are unable to appoint persons to the diplomatic service by reason of the great expense entailed at the larger posts, far in excess of the salaries, and that the government is therefore limited to persons of wealth who are both willing and able to draw upon their private means to meet the expenses properly incurred, but not covered by their salaries, in the successful performance of their missions. There is no doubt much truth in these statements, and it is a matter of regret that the country is deprived of the services of persons otherwise qualified,

⁴ Jules Basdevant: *L'Affaire des Pêcheries des Côtes septentrionales de l'Atlantique entre les États-Unis d'Amérique et la Grande-Bretagne*.

who cannot afford to supplement the salaries attached to the positions from their private means.

In his entertaining and instructive volume on the *Practice of Diplomacy*, General Foster, who has himself had wide diplomatic experience, says:

The great expense has debarred many prominent Americans from accepting diplomatic posts. Mr. Calhoun, in 1819, was offered the mission at Paris, but he answered that he was well aware that a familiar practical acquaintance with Europe was indispensable to complete the education of an American statesman, and regretted that his fortune would not bear the cost of it. Again, in 1845, he was tendered the mission to England, but declined for the same reason. George William Curtis, Senator Hoar, and other able and cultured public men have likewise been forced to decline our highest diplomatic posts.

To this list other and hardly less distinguished names might be added, but it is sufficient for the purposes of this comment.

Various means have been suggested to open the diplomatic service to men of ability instead of confining the highest posts to the favored few. In the first place, it may be suggested that the standard of living might be changed without impairing the usefulness of the diplomat, for it is an open question whether elaborate receptions and luxurious dinners really enable the diplomat to accomplish the purpose for which he is sent to a foreign country, namely, to represent his country abroad, to look after its interests, to carry out the instructions of the Department of State, to negotiate treaties and conventions, and to compose differences that unavoidably arise in the foreign intercourse of nations. On this point Mr. Jefferson expressed his matured views, after having been minister to France and shattered his fortune in living beyond his salary.

"You have doubtless heard," he said in a letter offering General Armstrong the mission to France in succession to Chancellor Livingstone, "of the complaints of our foreign ministers as to the incompetence of their salaries. I believe it would be better were they somewhat enlarged. Yet a moment's reflection will satisfy you that a man may live in any country on any scale he pleases. . . . I suspect from what I hear that the Chancellor, having always stood on a line with those of the first expense here, has not had resolution enough to yield place there, and that he has taken up the ambassadorial scale of expense. This procures one some sunshine friends who like to eat of your good things, but has no effect on the men of real business, the only men of use to you, in a place where every man is estimated by what he really is."

The question is not whether an American ambassador or minister shall take part in the social life of the community in which he resides and represents his country, but as to the extent of such participation measured by actual benefits to his country. It is related of the first Napoleon that, in approving the accounts of his ambassador to Russia, composed in large part of enormous outlays for wines and entertainment, he accompanied his approval with the curt comment that the ambassador should remember in the future that he was not sent to St. Petersburg to run a restaurant. It is to be feared that the French ambassador in question is not the only public servant to whom this remark could be applied in the modified form that the diplomatic agent is not expected to keep open house for all comers.

In the next place, it has been suggested that the salaries of diplomatic agents should be materially increased, but this depends in no small part upon the view taken of the social duties properly incumbent upon the diplomat. It will therefore be passed for the present, because it depends in like manner upon a recommendation made in one of President Cleveland's messages to Congress. "I am thoroughly convinced," he said, "that in addition to their salaries our ambassadors and ministers at foreign courts should be provided by the government with official residences. The salaries of these officers are comparatively small and, in most cases, insufficient to pay, with other necessary expenses, the cost of maintaining household establishments in keeping with their important and delicate functions. The usefulness of a nation's diplomatic representative undeniably depends, to a great extent, upon the appropriateness of his surroundings, and a country like ours, while avoiding unnecessary glitter and show, should be certain that it does not suffer in its relations with foreign nations through parsimony and shabbiness in its diplomatic outfit. These considerations, and the other advantages of having fixed and somewhat permanent locations for our embassies, would abundantly justify the moderate expenditure necessary to carry out this suggestion."

There can be no doubt that the purchase of suitable residences for our diplomatic officers would go far to open the service to men of moderate means by enabling them to live upon their salaries without drawing upon their savings, but the residences built or purchased should be modest; otherwise the official salary would be spent in maintaining them and the situation might be worse than before, because the official residence would have to be occupied by the diplomatist whether he

desired to do so or not. This point of view prevailed with the Congress which voted the following act, approved February 17, 1911:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State be, and he is hereby, authorized to acquire in foreign countries such sites and buildings as may be appropriated for by Congress for the use of the diplomatic and consular establishments of the United States, and to alter, repair, and furnish the said buildings; suitable buildings for this purpose to be either purchased or erected, as to the Secretary of State may seem best, and all buildings so acquired for the diplomatic service shall be used both as the residences of diplomatic officials and for the offices of the diplomatic establishment: *Provided, however,* That not more than the sum of five hundred thousand dollars shall be expended in any fiscal year under the authorization herein made: *And provided further,* That in submitting estimates of appropriation to the Secretary of the Treasury for transmission to the House of Representatives, the Secretary of State shall set forth a limit of cost for the acquisition of sites and buildings and for the construction, alteration, repair and furnishing of buildings at each place in which the expenditure is proposed (which limit of cost shall not exceed the sum of one hundred and fifty thousand dollars at any one place) and which limit shall not thereafter be exceeded in any case, except by new and express authorization of Congress.

Supposing, however, that the salaries be raised and residences be acquired, so that men of large brain and small purse can be appointed to the service, there is another matter that deserves consideration, namely, the permanency of the service. Our ambassadors and ministers, taken from private life, many of them without previous experience, have been wonderfully successful; but without a diplomatic service permanent in character — that is to say, a service which offers a career — we are not always sure of getting the right man, and, when we have got him and he has learned the essentials of his calling, he leaves the service after a few years, thus depriving the country of the experience which he has acquired and the efficiency which he has attained at the country's expense. It is not meant to suggest that ambassadors and ministers shall be chosen exclusively by promotion from lower grades in the service, because nations with a regular and permanent diplomatic service — that is to say, in which diplomacy is a career — often make appointments from the outside. A reference to Lord Pauncefote and to the distinguished representative of Great Britain, Mr. Bryce, who is still with us but, to our great regret, will leave us shortly, shows the advantage of strengthening the service by the selection of persons who have not followed the diplomatic career; but it would seem that such appointments should be the exception, not the rule, and that there should be very pressing and cogent reasons for doing so. Young men of ability

should be encouraged to enter the diplomatic service and their salaries should be such as to support them in their positions. The ambassadors and ministers require a trained corps of assistants to enable them to do their work properly. Secretaries of legation should not be chosen from men of means, which will inevitably be the case if their salaries are so small that they must contribute to their own support, and it is to be feared that there will not be sufficient encouragement to people dependent upon their own exertions, unless they can count upon permanency of tenure and promotion as a reward of merit.

The importance of securing able young men as secretaries of embassy or legation and by permanency of appointment offering them a career was often called to the attention of the authorities. In 1905 Secretary Root recommended that President Roosevelt take advantage of Section 1753 of the Revised Statutes of the United States, namely: "The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service."

The President did this by executive order. President Roosevelt's successor continued and enlarged the order, so that since President Roosevelt's administration original appointments as secretary of embassy and of legation have been made only after examination, and secretaries of embassy and legation have for faithful service been promoted to ministries. An efficiency record of the officers of the diplomatic service is kept, so that promotions may be based upon efficiency. A career is thus in process of formation, and it is to be hoped that the present administration will continue the precedents of its immediate predecessors in this regard. But however admirable in theory these executive orders may be, they are defective in practice, because a young man wishing to enter the service cannot present himself in his own right and upon passing the examination be appointed. Political influence plays its part. A young man wishing to take the examination is required to be designated, and designation is a matter of influence. In a Republican administration Republicans would be designated; in a Democratic administration the tendency would be to designate Democrats. But the

examination weeds out the unfit and supplies the embassies and legations with qualified secretaries.

Returning to the question of salaries, it is believed that a compromise may be reached which will give the President and Secretary of State free choice in filling the various posts in the diplomatic service at their disposal. If it be found that receptions and dinners are essential, an entertaining fund can be created and the number, nature and kind of receptions and diplomatic dinners prescribed and paid for out of this fund, for, if it be to the advantage of the diplomat to receive and entertain, it becomes his duty to do so, and the duty being official, the means to meet it should be supplied. It is feared, however, that the advantages of entertaining are exaggerated, just as our diplomats lay undue stress upon the advantages, indeed the necessities, of diplomatic costume. With Mr. Jefferson's statement concerning the alleged advantages of entertaining and lavish expenditure, may be quoted the statement of Andrew D. White on the matter of dress, who, as an experienced diplomatist, speaks with authority. "Truth compels me to add," he says, "that, having myself never worn anything save plain evening dress at any court to which I have been accredited, or at any function which I have attended, I have never been able to discover the slightest disadvantage to my country or myself from that fact."

The purchase of modest residences would relieve the ambassador or minister of a large item of expense, so that the salaries, where they are shown to be inadequate, would only need to be moderately increased. The opening of the diplomatic service to young men of parts and attainments with salaries adequate to their needs, with security of position and promotion for efficiency, would make diplomacy a career and would doubtless attract young men of ability, even although their purses were slender. The President and Secretary of State would thus be able to select competent persons out of the diplomatic service for the highest posts or for special reasons or for special occasions, and would have an efficient and trained personnel from which promotions could be made as necessity required or suggested.

RECOVERY BY NON-RESIDENT ALIENS FOR DEATH BY WRONGFUL ACT

On February 26 last the Senate of the United States advised and consented to the ratification of a new treaty signed by representatives of the United States and Italy on February 25, 1913, amending Article III

of the treaty of commerce and navigation concluded February 26, 1871 between the same countries.

The object and meaning of the recent treaty may perhaps be best understood when viewed in the light of the circumstances which led to its negotiation and signature. These circumstances appear to have begun with a railroad accident in Pennsylvania of which a subject of Italy was a victim. An Italian named Carmine Maiorano, while riding as a passenger on the Baltimore and Ohio Railroad in Pennsylvania was killed in a collision resulting from the alleged negligence of the employees of the company. At the time of the accident the laws of Pennsylvania contained a statute, based on Lord Campbell's Act, providing that upon death caused by unlawful violence or negligence, certain near relatives of the deceased had the right to recover damages from the guilty parties. Under this statute, the widow of Maiorano, who was also an Italian subject but who had never been in this country, brought suit by her attorney in this country against the railroad company to recover an indemnity for the death of her husband. The argument of the plaintiff was in substance that although the statute above mentioned was not, according to the previous decisions of the Supreme Court of Pennsylvania, applicable to non-resident aliens, nevertheless Article III of the treaty of 1871 being the supreme law of the land had the effect of enlarging the scope of the statute so as to include alien relatives residing abroad, because the right under the statute to sue for damages in case of injury or death operated as "protection and security for their persons" against wanton negligence on the part of employers or third persons. Article III of the treaty of 1871 reads in part as follows:

The citizens of each of the high contracting parties shall receive in the States and Territories of the others, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives.

With the plaintiff's reasoning, however, the Supreme Court of Pennsylvania disagreed and on appeal was sustained by the Supreme Court of the United States. That court held substantially that this article of the treaty afforded merely protection and security to persons and property *in this country* and that the widow of Maiorano being a non-resident, did not come within the meaning of Article III as contemplated by the negotiators of the treaty.

Mr. Justice Moody delivering the opinion of the court said:

It cannot be contended that protection and security for the person or property of the plaintiff herself have been withheld from her in the territory of the United States, because neither she nor her property has ever been within that territory. She herself, therefore, is entirely outside the scope of the article. The argument, however, is that if the right of action for her husband's death is denied to her, that he, the husband has not enjoyed the equality of protection and security for his person which this article [Article III] of the treaty assures to him. It is said that if compensation for his death is withheld from his surviving relatives, a motive for caring for his safety is removed, the chance of his death by unlawful violence or negligence is increased, and thereby the protection and security of his person diminished. The conclusion is drawn that a full compliance with the treaty demands that, for his protection and security, this action by his surviving relative should lie. * * * We are of opinion that the protection and security thus afforded are so indirect and remote that the contracting Powers cannot fairly be thought to have had them in contemplation. If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety. (*Maiorano v. Baltimore & Ohio R. R. Co.*, 213 U. S. 268, at 274, 275.)

Following this decision, the Italian Government took up with the Government of the United States the discussion of the questions involved particularly with reference to the interpretation placed upon the treaty of 1871 by the Supreme Court in the Maiorano case. As a result of this discussion negotiations were undertaken in the summer of 1912 with a view to concluding an agreement modifying Article III of that treaty so as to meet the objections pointed out by the Supreme Court. The resulting arrangement took the form of the Italian treaty recently approved by the Senate, of which Article I is in the following language:

The citizens of each of the high contracting parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter.

It will be noted that this article mentions in addition to "persons and property" a third subject of security and protection namely "rights," and that these are defined to include rights under any law establishing a civil responsibility for injuries or death. The original limitation however is retained, namely, that aliens have no greater rights in this respect than are granted to nationals. The advantages growing out of the enlarged scope of Article III will, it is understood, also be available to citizens or subjects of other countries, whose Governments have most favored nation treaties with either the United States or Italy. This concession, however, is not so extensive as it at first seems, for a large proportion of the states of the Union, including Pennsylvania, have now made their "Lord Campbell's Acts" applicable to non-resident as well as resident aliens.

As illustrating further the need of an international understanding in regard to the rights of non-resident aliens, attention may be called to the case of Terlinden which arose in Wisconsin in 1901. Terlinden, a subject and resident of Germany, embezzled a sum of money belonging to a German bank, fled to the United States and deposited it in a Milwaukee bank. He was subsequently extradited to Germany. The German bank, however, and an American creditor of the embezzler, brought suit to recover the money left by Terlinden in the Milwaukee bank. The Supreme Court of the United States on appeal affirmed the decision of the Supreme Court of Wisconsin, that as between two creditors, one non-resident alien and one an American citizen, both claiming the same money in this country, preference should be given to the American even though his claim arose after attachment by the alien, and that, therefore, in this case the American creditor of Terlinden was entitled in preference to the German bank to the deposit made by Terlinden in the Milwaukee bank.

A point was made that the rights of the German bank were protected by Article I of the treaty of 1828 between the Government of the United States and the Kingdom of Prussia, which provides that the "inhabitants" of either country "shall enjoy the same security and protection as natives of the country where they reside." But Mr. Justice Day, delivering the opinion of the United States Supreme Court, stated

There is nothing in this treaty undertaking to change the well recognized rule between States [of the Union] and nations, which permits a country to first protect the rights of its own citizens in local property before permitting it to be taken out of

the jurisdiction for administration in favor of those residing beyond their borders. (*Disconto Gesellschaft v. Umbralit*, 208 U. S. 570, at 582.)

It is interesting to consider whether this decision would have been rendered had the new Italian treaty been in force at the time and had the German bank taken advantage of it by virtue of a most favored nation treaty between Germany and the United States. If the State of Wisconsin applies the rule of the *Terlinden* case also to non-resident citizens of sister States, it may be a question whether the German bank could complain even under Article I of the new Italian treaty, which retains the principle of equality of treatment with nationals.

IN MEMORIAM

On October 6, 1912, the distinguished Belgian statesman and publicist, Mr. Auguste Beernaert, died at Lucerne, Switzerland. He was born in 1828 and was thus at the time of his death eighty-four years of age. Educated at the Universities of Louvain, Paris, Berlin and Heidelberg, he was a lawyer by profession and found the law the highway to political success. He was elected a deputy in 1873 and after filling various cabinet posts he was Prime Minister from 1884 to 1895, and from this year to 1900 he was President of the Chamber. With his career as a statesman this comment is not concerned, but it is important to bear in mind his training at the bar and his experience in office, in order to understand the influence which his advocacy of peaceful settlement of international disputes exerted upon the cause of arbitration. Delegate of Belgium to the First Peace Conference which met at The Hague in 1899, he was president of the commission to which the question of the limitation of armaments was referred. It is well known that the Powers generally took very little interest in this subject and that it was difficult to bring about a discussion of it. Mr. Beernaert had the happy thought of calling upon each member of the commission in alphabetical order and by this device, as simple as it was effective, provoked a discussion. A convention dealing with the subject was impossible, but it was something of a triumph to have had the question discussed, especially in view of the ill-disguised contempt with which it was regarded by many, if not most, of the delegates. Mr. Beernaert was heartily in favor of establishing the so-called Permanent Court, which is in reality merely

a list of judges from which a temporary tribunal can be formed for the trial of a case. As Belgian delegate to the Second Conference held in 1907, he was bitterly opposed to the American project to constitute a truly permanent court composed of judges, as he believed the essence of arbitration to consist in the free choice of arbiters. He was honest in his belief and out-spoken in his advocacy, and the course that he pursued was, as he believed, in the interest of, not opposed to, arbitration. When his government directed the Belgian delegation, of which he was the head, to oppose the negotiation of a general treaty of arbitration, he refused to be the spokesman of his delegation. The writer of this comment recalls Mr. Beernaert's genuine grief at the failure of the general treaty of arbitration. Mr. Beernaert was a prominent member of the Interparliamentary Union, of which he had been president, and devoted a considerable portion of his share of the Nobel Peace Prize, with which he was honored in 1902, to entertaining the Union. He had had experience as a lawyer before arbitration tribunals, notably in 1902, when in the first case tried before the Permanent Court of Arbitration he appeared in behalf of Mexico against the contention of the United States in the so-called Pious Fund case. Leaving out of consideration the numerous smaller disputes in which he acted as arbiter, he was in 1910, a member of the temporary tribunal of the Permanent Court of The Hague which passed upon the Orinoco Steamship case submitted to the tribunal by Venezuela and the United States, and more recently, president of the temporary tribunal of the Permanent Court of The Hague, which, in 1911, decided the Savarkar case between France and Great Britain.

Mr. Albert K. Smiley died at his winter home in Redlands, California, on December 2, 1912. His life was prolonged beyond the three score years and ten (he was born on March 7, 1828) and he was mercifully enabled to carry out in his old age the plans and hopes of his youth and to rejoice in their fruition. He graduated from Haverford College, taught school for many years, and acquired large and beautiful property at Lake Mohonk in the State of New York. Here he welcomed as his house guests in May or June of each year from 1894 upwards of three hundred people interested in the peaceful settlement of international disputes, principally by means of arbitration. These meetings — called the Lake Mohonk Conferences on International Arbitration — have brought together leaders of thought not only in the United States but from foreign countries, and the annual reports, of which eighteen were

published during Mr. Smiley's lifetime, contained not merely interesting information, but suggestions and discussions of permanent value. The conferences have been regularly reported in the press, and the statement of principles, resolutions or platform adopted at each conference is widely circulated. The reported proceedings have indeed made their way into the literature of the subject with which the conferences deal. It is gratifying to the friends of arbitration to know that the conferences so auspiciously begun by Mr. Albert K. Smiley will be continued by his brother, Mr. Daniel Smiley, who has been long associated in the good work.

In the death of Count Leonidas Kamarowsky in December, 1912, at the age of sixty-six, international law lost a student and thinker likely long to be remembered. Besides numerous writings in Russian, which have not been translated, and various articles in the *Revue de Droit International et de Législation Comparée*, the distinguished publicist, who was many years professor of international law at the University of Moscow and was a member of the Permanent Court of Arbitration of The Hague at the time of his death, published in the eighties a work on an international tribunal, which, translated and published in French in the year 1887 under the title of *Le Tribunal International*, has had a very great influence in popularizing the idea and the feasibility of a permanent international tribunal. This work, translated into French by Serge de Westman, is the first scientific treatment and discussion of the problem which had been made, and is still the standard statement of the reasons for and the feasibility of such a tribunal. Professor Kamarowsky's work is at once analytical, historical and constructive. Thus, in the first part he discusses the different methods of settling conflicts between nations, dividing them into (1) methods of coercion, such as retorsion, reprisals, embargo, pacific blockade, and war; (2) diplomatic methods, such as lot and single combat, direct negotiations, intervention of third states, good offices, mediation, congresses and conferences; and, finally, judicial methods. He next takes up the genesis of the idea of an international tribunal and, after a careful historical survey of the subject, discusses national tribunals destined to become international, and the forms of arbitral sentence. In the third book he outlines the theoretical development of the idea of an international tribunal; and in the fourth and concluding book of this admirable work, which, as a distinguished publicist has said, subsequent authors have reproduced and slavishly copied, Kamarowsky lays down what he con-

siders to be the fundamental principles involved in the organization of an international tribunal. It is not the purpose of this comment to enter into a detailed analysis of this admirable work. Its purpose is merely to commend it to the careful consideration of the reader and to call attention to the great services which the late publicist rendered to the judicial settlement of international disputes.

The distinguished Dutch publicist, Lieutenant General den Beer Poortugael, died at The Hague on January 30, 1913. Born on the first of February, 1832, he was eighty-one years of age. The General was long a member of the Institute of International Law in whose proceedings he took a prominent part, was the author of various works dealing with certain phases of international law — particularly war — among which may be mentioned: *The Law of War* (1872), *International Maritime Law* (1888), *The Law of War and Neutrality* (1900), *The Principles of the Geneva Conference* (1906), and an interesting and valuable monograph entitled *The Two Hague Peace Conferences* which appeared shortly after the adjournment of the Second Conference in 1907. The General was a delegate of his country to the First and Second Peace Conferences, and in all matters concerning the usages and customs of war, whether on land or sea, he invariably took an advanced and humanitarian attitude. He was a partisan of arbitration and a believer in the peaceful settlement of international disputes. His rank as a Lieutenant General in the army and his position as a former Minister of War gave weight to his advocacy of peaceable settlement. His connection with the Institute of International Law and his scientific attainments would have procured for his writings on international law a wider circulation if, instead of being written in Dutch, they had been written in a language more generally understood.

CHRONICLE OF INTERNATIONAL EVENTS WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Ann. Vie Int.*, Annuaire de la Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bollettino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain, Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *N. R. G.*, Nouveau recueil générale de traités, Leipzig; *Q. dipl.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Gröningen; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, the Times (London); *Treaty ser.*, Great Britain, Treaty series.

August, 1912.

- 27-Sept. 4. INTERNATIONAL WEEK OF ETHNOLOGY — a series of conferences held at Louvain. *La Vie Int.*, 2:454.
31-Sept. 7. FOURTH INTERNATIONAL CONGRESS FOR THE SANITATION OF DWELLINGS (*d'Assainissement et de Salubrité de l'habitation*) met at Anvers. *La Vie Int.*, 1:607; 2:456.

September, 1912.

- 1-3 INTERNATIONAL CONGRESS OF FREE THOUGHT met at Munich. *La Vie Int.*, 2:466.
2-7 SIXTH CONGRESS OF THE INTERNATIONAL ASSOCIATION FOR THE TESTING OF MATERIALS met at New York. *La Vie Int.*, 2:457.
6-7 INTERNATIONAL CONGRESS FOR THE PREVENTION OF STRIKES met at Zurich. *La Vie Int.*, 2:466.
6-7 INTERNATIONAL CONGRESS AGAINST EPILEPSY met at Zurich. *La Vie Int.*, 2:466.

October, 1912.

- 7-12 EIGHTH INTERNATIONAL CONGRESS OF SOCIOLOGY met at Rome.
The next session will be at Vienna in 1915. *La Vie Int.*, 2:440.

October, 1912.

- 8 INTERNATIONAL CONFERENCE FOR THE UNIFICATION OF METHODS OF ANALYSIS OF ALIMENTARY PRODUCTS met at Paris. *La Vie Int.*, 2:442.
- 19 The Executive Commission of the EUROPEAN CONFERENCE OF THE WORK OF RAILWAY STATIONS (*L'Œvre des Gares*), for the protection of traveling young women, met at Berne. *La Vie Int.*, 2:449.
- 21-(Nov. 3.) MONGOLIA — RUSSIA. Treaty signed at Urga. *Times*, November 5, 8, December 26, January 6, February 7; *Cd.*, 6604; *Les Negociations sino-russo-mongoles*. *La R. Jaune*, 3:51-63. *Q. dipl.*, 35:124.
- 21-26 INTERNATIONAL CONGRESS OF DRY FARMING met at Lethbridge, Alberta. *B. Rel. Ext.*, Chile, September.
- 23 FRANCE — SWITZERLAND. Arrangement signed at Berne for pasture on the pastures situated on both sides of the frontiers. *J. O.*, December 25.
- 23-29 INTERNATIONAL ALLIANCE OF MEN FOR THE SUFFRAGE OF WOMEN met at London. *La Vie Int.*, 2:443.
- 26-Nov. 10. FOURTH INTERNATIONAL EXHIBIT OF AERIAL LOCOMOTION held at Paris. *Daily Consular and Trade Reports*, Washington, December 4.

November, 1912.

- 1 ANGLO-GERMAN CONFERENCE at London closed. *Times*, November 2.
- 4-6 INTERNATIONAL CONFERENCE OF THE AERONAUTIC FEDERATION met at Paris. *La Vie Int.*, 2:468.
- 5-8 FOURTH INTERNATIONAL CONGRESS OF RICE-CULTURE met at Vercelli. *La Vie Int.*, 2:468.
- 11 RUSSIA — TURKEY. Sentence rendered by the Hague Tribunal in the matter of the Russian claim for interest on deferred indemnity payments. This is the eleventh decision. Decision in *this Journal*, 7:178-201, Protocol in *Supplement*, 7:62.
- 13 PANAMA CANAL. Proclamation issued fixing rates of toll to be paid by vessels using the Panama Canal. No. 1225. Text of British Notes of July 8, 1912 and November 14, 1912 in *this Journal*, *Supplement*, 7:46-57.
- 15 GREAT BRITAIN — UNITED STATES. Exchange of ratifications at Washington of agreement signed at Washington, July 20, 1912,

November, 1912.

adopting with certain modifications the rules and method of procedure recommended in the award of September 7, 1910 of the North Atlantic Coast Fisheries Arbitration. *U. S. Treaty series*, No. 572.

- 16 INTERNATIONAL CONFERENCE FOR THE ASSISTANCE OF STRANGERS met at Paris. *La Vie Int.*, 2:468.
- 20 GREAT BRITAIN — SIAM. Agreement signed at Bangkok regarding the rendition of fugitive criminals between certain states in the Malay Peninsula and Siam. *Treaty ser.*, No. 2, 1913.
- 23 Executive Committee of the INTERPARLIAMENTARY UNION met at Brussels. *La Vie Int.*, 2:334.
- 27 FRANCE — SPAIN. Treaty regarding Morocco signed at Madrid. *Times*, November 28.

December, 1912.

- 5 INTERNATIONAL LITERARY AND ARTISTIC ASSOCIATION held its thirty-fourth assembly general at Paris. *La Vie Int.*, 3:82.
- 7 THE TRIPLE ALLIANCE is renewed between Austria-Hungary, Germany, and Italy. *R. Politique et Parlementaire*, 74:183. Lemonon, Le renouvellement de la triple-alliance, *Q. dipl.* 35:86-93.
- 10 NOBEL PRIZES. In Literature, Gerhart Hauptman; Chemistry, Paul Sabatier and François Grignard; Physics, Gustof Dalen; Medicine, Alexis Carrel. The Peace Prize was not awarded. *La Vie Int.*, 2:307-311. *Independent*, 73:1438-9.
- 16 INTERNATIONAL STUDENTS' UNION founded at Heidelberg. *Advocate of Peace* 75:31.
- 16 BALKAN STATES — TURKEY. Peace conference opened at London. *Times*, December 16. An armistice had been signed at the Tchataldja lines on December 3; negotiations were broken off by the allies January 30. *Q. dipl.*, 35:237. Hostilities were resumed February 3 at seven o'clock, p. m. See below, January 17 and 30.
- 23 DENMARK — NORWAY — SWEDEN. Signing of a neutrality agreement announced at Stockholm. *American R. of Rs.*, 47:165.

January, 1913.

- 1 RUSSIA — UNITED STATES. Commercial treaty expires. Officially announced at St. Petersburg December 29 that minimum rates would still be in effect. *American R. of Rs.*, 47:166.

January, 1913.

- 4-5 INTERPARLIAMENTARY UNION. Two commissions met at Paris; one, on the neutralization of straits and canals, the other, on declarations of permanent neutrality. *La Vie Int.*, 3:75.
- 8 INTERNATIONAL COMMITTEE ON ALCOHOLISM met at Paris. *La Vie Int.*, 2:469.
- 17 BALKAN STATES — TURKEY. Note sent by representatives of the Powers to Turkey advising cession of Adrianople and the Aegean islands. Text in *Mém. dipl.*, 51:38; in *Q. dipl.*, 35:173; reply of the Porte in *Q. dipl.*, 35:238.
- 22 THE INTERNATIONAL INSTITUTE OF PEACE was inaugurated at Paris. *Mém. dipl.*, 51:116.
- 27 INTERNATIONAL CONGRESS OF CHRISTIAN WORKERS OF ALIMENTATION met at Brussels (to protest against night and Sunday work in bakeries and pastry shops). *La Vie Int.*, 3:77.
- 28 INTERNATIONAL AERONAUTIC FEDERATION met at Paris. *La Vie Int.*, Fascicule 9, Annexe, p. 2.
- 30 BULGARIA — ROUMANIA. Protocol signed at London stating the Roumanian demands and the Bulgarian concessions. *Q. dipl.*, 35:243.

OTIS G. STANTON.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN¹

Balkan war. Proclamation declaring His Majesty's neutrality in October 21, 1912. *Statutory Rules and Orders, 1912*, No. 1614. 1½d.

British and Foreign State Papers. Vol. 101. 1907-1908. *Foreign Office*. 10s. 6d.

China, Further correspondence respecting affairs of [December, 1911 to March, 1912.] Cd. 6447. 2s. 2d.

Chinese loan negotiations, Correspondence respecting. Cd. 6446. 3½d.

Colombia, Protocol between United Kingdom and, respecting application of treaty of commerce of February 16, 1866, to certain parts of H. B. M. Dominions. Signed at Bogota, August 20, 1912. *Treaty series, 1912*, No. 24. 1d.

International convention for suppression of white slave traffic. Signed at Paris, May 4, 1910. *Treaty series, 1912*, No. 20. 1½d.

International Copyright Convention, Berlin, November 13, 1908. Accession of The Netherlands. November 1, 1912. *Treaty series, 1912*, No. 25. 1d.

International Opium Conference, The Hague, December, 1911-January, 1912. Report of the British delegates. Cd. 6448. 5½d.

Japan, Exchange of notes between United Kingdom and, for the reciprocal waiver of consular fees on certificates of origin relating to exports. Tokio, October 26/31, 1912. *Treaty series, 1912*, No. 23. 1d.

Land warfare. An Exposition of the Laws and Usages of War on Land, for the guidance of the Officers of H. M. Army. 1s. 2d.

Naval expenditure of principal naval Powers in each year since 1900. *H. C. Repts. and Papers, 1912*, No 300. 2d.

North Atlantic fisheries, Agreement between United Kingdom and United States respecting. Signed at Washington, July 20, 1912. *Treaty series, 1912*, No. 22. 1d.

¹ Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

Panama Canal Act, Despatch to H. M. Ambassador at Washington respecting the. *Cd.* 6451. 3s.

Portugal, Agreement between Great Britain and, respecting boundaries in East Africa. Lisbon, July 22/August 9, 1912 (with map). *Treaty series, 1912*, No. 21. 7d.

Russo-Japanese War. Official history (naval and military). Vol. II. Liao-Yang, the Sha-ho, Port Arthur. With case of maps. 15s. 10d.

State papers and manuscripts relating to English affairs, existing in the archives and collections of Venice, and in other libraries of northern Italy. Vol. XVIII. 1623-1625. 15s. 6d.

UNITED STATES ²

Alaska fisheries and fur industries in 1911. 99 p. *Bureau of Fisheries doc.* 766. Paper, 10c.

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² When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

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GEO. A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

LEGAL ASPECTS REGARDING THE OWNERSHIP AND DISTRIBUTION OF AWARDS.¹

In adjusting international claims there are two distinct stages: first, that having to do with the espousal and diplomatic presentation of the claim by the government of the injured national and the determination of the validity and amount of the claim; and, secondly, the distribution of the award among those entitled to receive it. It seems entirely sound to say that (under existing principles and rules of law) the first stage, that is, the espousal and diplomatic presentation of the claim and the determination of its validity and amount, is governed by, and must be conducted in accordance with, the rules and principles of international law. It seems equally sound to say that the second stage, that is, the distribution of the award among those entitled to receive it, is a matter not of international law, but of municipal law which embodies the rules and principles governing and controlling private, personal and property rights. As was aptly said in *Phelps v. McDonald* ([1878] 99 U. S., 297):

“Such commissions [for passing upon the validity and amount of international claims] as that which made the award here in question usually decide only as to the validity of the claim and the amount to be paid. It is rarely, if ever, within their jurisdiction to decide upon the ownership of the claim. They have no means of compelling the attendance of parties or witnesses, no rules of pleading or procedure applicable to such a case, and the foreign element in the tribunal, at least, can not be supposed to have any knowledge of the law according to which the question is to be determined. The validity of the claim depends upon the law of nations; its ownership, upon the local jurisprudence where the transfer is alleged to have been made.” (p. 307.) And see *Frevall v. Bache* ([1840] 14 Pet., 95).

As these principles are basic in the determinations incident to the distribution of awards, a brief detailed discussion may prove not without use.

¹ Part of Opinion by the Hon. Joshua Reuben Clark, Jr., Solicitor for the Department of State, August 14, 1912, *in re* Distribution of Alsop award.

BY ESPousing A CLAIM DIPLOMATICALLY THE GOVERNMENT MAKES
THE CLAIM ITS OWN

It should, in the first place, be observed that by espousing a claim of its national for injuries inflicted by a foreign government the espousing government makes the claim its own. As the Supreme Court of the United States has said, in speaking of the claim of Weil (presented to the United States and Mexican Claims Commission organized under the Convention of 1868):

"The Government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it." (*Boynton v. Blaine* [1890] 139 U. S., 306, 323).

And again, with reference to the claim of the La Abra Company, the same court said:

"The United States assumed the responsibility of presenting the claim and made it its own in seeking redress from the Mexican Republic." (*La Abra Silver Mining Company v. U. S.* [1899] 175 U. S., 423, and see to same effect, *Frelinghuysen v. Key* [1882] 110 U. S., 63; *Angarica v. Bayard* [1888] 127 U. S., 251; *Great Western Insurance Company v. U. S.* [1884] 19 Ct. Cls., 432.)

It follows from this that in presenting a claim diplomatically, our government acts in its sovereign capacity (see both cases just cited) and, therefore, is acting neither as an agent for the claimant (*Great Western Insurance Company v. U. S.*, *supra*) nor as a trustee for the claimant. (*Great Western Insurance Company v. U. S.*, *supra*; *Boyn-ton v. Blaine*, *supra*; *United States v. La Abra Silver Mining Company* [1894] 29 Ct. Cls., 432.)

The position of the Department of State on this question has been most clearly stated by Secretary of State Olney in connection with the Mora claim, when in writing to the Attorney General under date of October 7, 1895, the Secretary said:

"The claim has been loosely spoken of in diplomatic correspondence and otherwise, as the claim of Antonio Maximo Mora against the Government of Spain. Nevertheless, that description of the claim is to be regarded rather as identifying it than as showing its true legal character. It was in fact the claim of the United States against Spain, prosecuted as such and paid as such. The money was paid by draft in favor of the Secretary of State of the United States, and the proceeds are now deposited in the subtreasury of the United States to the order of the Secretary. During the course of the negotiations, which ended in the final settlement of the claim, I had frequent consultations with the parties in interest. I consulted with them not because I was obliged to, but because I

desired that any settlement made should be satisfactory to them. In several letters to me on the subject, the counsel of Mora and his assignees admitted more than once that, while they appreciated the privilege of being conferred with as to the terms of settlement, all the right and all the discretion in the matter were vested in the Government of the United States. The only action of Congress on the subject, that I am aware of, is the joint resolution of March 2, 1895, 28 Stats. at Large, 975." (Moore's International Law Digest, Vol. VI, pp. 1021-1022.)

(And see letter from Secretary Frelinghuysen to Messrs. Mullan and King, February 11, 1884, Moore's International Law Digest, Vol. VI, p. 1016.)

In an earlier letter (October 2, 1895) to the Attorney General regarding the same case, Secretary Olney had said:

"My view is that it [the case of *Frazer v. Dexter*] can be dismissed, because the Mora money [received from Spain in settlement of the claim of Mora] is held by the United States as sovereign and not as trustee or stakeholder for any person or persons; that the suit, though formally against the Secretary of State, is really against the United States, and that the disposition to be made of the money is a political question, to be decided by the political department of the Government and not by the judicial. At all events the judicial department can have no cognizance of that question until the political department shall have decisively acted. In support of this view, permit me to call your attention to the case of the United States *v.* The La Abra Mining Company et al., reported in the 29th volume of the Court of Claims, page 432. On page 459 you will find a citation by the counsel of the United States of some pertinent cases decided by the Supreme Court of the United States." (Moore's International Law Digest, Vol. VI, p. 1034.)

Moreover, that the government acts, and properly may so act, in its sovereign capacity in dealing diplomatically with claims of its nationals against other governments is shown by the fact that not infrequently foreign governments are by this government entirely relieved from all liability for injuries inflicted upon our citizens, without the payment by them of any money whatever, and this is done both by treaty provision (see treaty between the United States and France of 1800-1803 releasing the "French Spoliation" claims; the provisions of the Treaty of Peace between Spain and the United States in 1898, releasing Spain from liability for injuries suffered by American citizens) and by mere diplomatic or executive agreements. (Release by American Minister of claim for damages, as part of consideration for release of vessel "*Schooner B. S. Allen*," Moore's Arbitrations, p. 2430; for diplomatic adjustment involving no specific release, see Houard's case against Spain, Moore's Arbitrations, p. 2428, and McLeod's case for similar release in favor of the United States,

Moore's Arbitrations, p. 2419.) Again, this government has, after beginning, discontinued the formal and official prosecution of a case for reasons regarded as sufficient by the Department of State (Case of the "Haytian Republic" against Haiti, see Moore's Digest, Vol. VI, p. 1016, and generally p. 1026) and it arranges settlements of claims.

Finally, that this government, by presenting a claim diplomatically to another, thereby takes over, assumes responsibility for, and becomes the owner of it, has always been the consistent doctrine of the Department of State and it has uniformly acted in accordance therewith. (Moore's Digest, Vol. VI, §§ 1055-1060, p. 1012 et seq.)

Since a claim for injury to its national is thus presented by one sovereign to another sovereign, it necessarily follows, as already suggested, that the determination of the validity and amount of the claim is an international (as distinguished from national or municipal) adjudication, and is made under and in accordance with the applicable rules and principles of international law. Therefore, the function of international arbitration in such cases, as also of pure diplomatic adjustments when the settlement of a claim takes this form, is the determination of the questions of validity and amounts as between sovereigns, and not the determination of questions regarding the private ownership of the award under the applicable rules and principles of the national municipal law in force in the country to which the award is paid. This is true whether the international award has been made in a lump sum, the passing upon individual claims being assigned to a local commission, as, for example, the French Indemnity of 1831 (*Frevall v. Bache* [1840] 14 Pet., 95); the Chinese Indemnity of 1858 (The Caldera Cases [1879] 15 Ct. Cls., 546); and the Alabama Claims Commission (*Williams v. Heard* [1890] 140 U. S., 529), or whether the award is not a lump sum, but is an award in an individual case and made by an international commission which is organized for the express purpose of passing upon the individual claims, as, for example, the awards by the commission sitting under the Convention with Mexico of 1868 (*Frelinghuysen v. Key* [1883] 110 U. S., 63), and the commission sitting under the Convention of 1871 for the settlement of Civil War Claims with Great Britain (*Phelps v. McDonald* [1878] 99 U. S., 297). Obviously this fact will usually be covered and made entirely clear either by the statute creating the local commission, or the treaty or protocol creating the international commission; for example, the protocol in the Alsop Case submitted to the *Amiable Compositeur* the question,

as between the Governments of the United States and Chile, "what amount, if any, is * * * equitably due the claimants." ("Case of the United States, p. 1.)

**THE FUND WHEN RECEIVED IS A NATIONAL FUND, IN WHICH CLAIMANTS
HAVE NO STRICT LEGAL OR EQUITABLE RIGHTS**

From these principles it follows naturally that the award when received after the determination of its validity and amount belongs to the nation and constitutes a national fund. This proposition was contested by the claimants in certain cases cited in the preceding discussion, but the court declined to acquiesce in the contention. The true doctrine on this point was set forth by the Supreme Court in *Williams v. Heard* ([1890] 140 U. S., 529) when the court said:

"It was held in *United States v. Weld* (127 U. S., 51), that this award was made to the United States as a nation. The fund was, at all events, a national fund to be distributed by Congress as it saw fit. True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as justice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in the payment of such losses. But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund.

"* * * There was, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the Confederate cruisers; and in this sense all the claims of whatsoever nature were possessed of greater or less pecuniary value. There was at least a possibility of their payment by Congress—an expectancy of interest in the fund, that is, a possibility coupled with an interest."

While this particular statement was made in a case dealing with the ownership of a portion of a lump-sum award (the Alabama Claims fund) there appears no doubt but that the principle is equally applicable and controlling in cases where awards are made in the names of individual claimants by international commissions. For example, in *La Abra Silver Mining Company v. United States* ([1899] 175 U. S., 423) where an international commission had made an award in favor of or in the name of the plaintiff company, the Supreme Court said:

"The money in the hands of the Secretary of State was paid to the United States by Mexico pursuant to the award of the Commission. That tribunal dealt only with the two Governments, had no relations with the claimants, and could

take cognizance only of claims presented by or through the respective governments. No claimant, individual or corporate, was entitled to present any demand or proofs directly to the Commission. * * * As between the United States and Mexico, indeed as between the United States and the American claimants, the money received from Mexico under the award of the Commission was in strict law the property of the United States, and no claimant could assert or enforce any interest in it so long as the Government legally withheld it from distribution."

That the fund received in such cases is a national fund is further shown by the fact that the government has always exercised the right to reopen awards for the purpose of determining if they were improper or unjust and of refunding whatever sums it seemed inequitable to retain, and this has been done in spite of the protests and legal and other proceedings of claimants.

[This government, by new conventions, reopened international awards in favor of its citizens in connection with the United States and Venezuelan Commission of 1867-68 (Moore's Arbitrations, p. 1659 et seq; I Senate For. Rel. Committee Reports, p. 471 et seq); and in connection with the awards of the Mixed Venezuelan Commissions of 1903, one case, the Orinoco Steamship case, being resubmitted to an arbitral tribunal (see record of tribunal) and another, the Orinoco Corporation, being settled by diplomatic arrangement. (And see also Gibbs case and others under the United States and Colombian Commissions of 1857 and 1864, Moore's Arbitrations, pp. 1361 et seq., particularly 1396 et seq; Gibbs case, 13 Op. Atty. Gen'l. p. 19.) Congress has referred to the Court of Claims questions involving the validity of international awards. (The Weil and La Abra cases, Moore's Arbitrations p. 1324 et seq.) The Senate alone has investigated claims passed upon by domestic commissions. (Moore's Arbitrations, pp. 1255 et seq., 1263.) The Secretary of State of his own volition has reopened for examination claims passed upon by an international arbitrator. (Pelletier and Lazare cases against Haiti, For. Rel. 1887, p. 593 et seq., Moore's Arbitrations, p. 1749 et seq.)

Moreover, funds received from foreign governments in settlement of American claims, have been returned to foreign governments because investigations made by this government showed that the claims were for one reason or another improper. (La Abra and Weil cases, *supra*; *Brig Caroline*, a claim against Brazil, For. Rel. 1874, p. 95, Senate Ex. Doc. No. 52, 43rd Cong. 1st Sess., I Senate For. Rel. Committee Reports, p. 484.) Indeed in all these three cases Congress appropriated public moneys to make up for that part of the awards which had been already distributed among claimants. Moreover, in the *Caroline* case the Secretary of State appears to have refunded part of the money without congressional authority, and he similarly practically waived payment of any indemnity in the Pelletier and Lazare cases, *supra*.

When lump sums have been awarded to the United States in settlement of claims, this government has consistently returned all sums in excess of the losses actually suffered. (Chinese Indemnity 1858, Moore's Arbitrations, p. 4627 et

seq; Boxer Indemnity 1901, For. Rel. 1907, p. 174; Japanese Indemnity 1864, For. Rel. 1888, p. 1069, Moore's Digest, Vol. V, p. 749.)

Moreover, in distributing awards Congress has invoked and acted upon the same principle, giving the fund to whom it chose and cutting off from participation those whom it wished. For example, in appropriating money to meet the "French Spoliation" claims, Congress first charged the Court of Claims to determine the then present ownership of the various claims, after which and upon receiving the report of the court, it appropriated money to pay the claims but provided that it should go to the next of kin of the "original sufferer," specifically excluding assignees under bankruptcy proceedings and all others who did not represent the next of kin. (See 26 Stat., 897, 908; for interpretation of this statute, see *Bagge v. Balch* [1896] 162 U. S., 439.) Again, in dealing with the Alabama Claims award, Congress provided that the commission might award attorneys' fees to those appearing for claimants before the commission, but declared that—

"all other liens upon, or assignments, sales, transfers, either absolute or conditional for services rendered or to be rendered about any claim or part or parcel thereof provided for in this bill heretofore or hereafter made or done before such judgment is awarded and the warrant issued therefor, shall be absolutely null and void and of no effect." (18 Stats., sec. 18, p. 245; for interpretation of this statute see *Bachman v. Lawson* [1883] 109 U. S., 659.)

**BOTH THE EXECUTIVE AND CONGRESS HAVE CERTAIN PLENARY POWERS
OVER SUCH FUND AND THE DISTRIBUTION THEREOF**

When the fund in settlement of claims is received from the foreign government, either as the result of diplomatic adjustment or of international arbitration and following the determination of the validity and amount of the claim, the national jurisdiction attaches thereto and normally it is thereafter dealt with in accordance with the rules and principles of national municipal law and not international law.

Such a fund so received at once becomes subject to the exercise of two powers—that of the executive or political branch of the government and that of the legislative branch. Roughly the jurisdictions of these respective powers are as follows:

Control by the executive

After the fund is received from the foreign government, the political branch of the government still deals with it in so far as there may be

international questions involved, such for example as the refunding of the award if obtained by means of fraud or imposition, or the making of provision for the resubmission of cases to arbitration (in the exercise of which power, the Senate obviously may be involved). In these matters it would seem that the powers of the executive are more or less plenary. The question has never, so far as has been observed, been adequately discussed, though it received some attention by the Supreme Court in connection with the various La Abra and Weil cases. In *Frelinghuysen v. Key* ([1883] 110 U. S., 63), where complainants sought to compel, by mandamus, the distribution of the Weil award by the Secretary of State, who was withholding such sums pending the action of the Senate on a treaty providing for a rehearing of the cases, the court, in denying the writ, said:

"All we decide is, it was within the discretion of the President to negotiate again with Mexico in respect to the claims, and that as long as the two governments are treating on the questions involved, he may properly withhold from the relators their distributive shares of the moneys now in the hands of the Secretary of State."

There was also involved in this case the interpretation of a statute of Congress with reference to the powers conferred and duties imposed thereby on the executive. Section 1 of this statute provided:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of State be, and he is hereby, authorized and required to receive any and all moneys which may be paid by the Mexican Republic under and in pursuance of the conventions between the United States and the Mexican Republic for the adjustment of claims, concluded July fourth, eighteen hundred and sixty-eight, and April twenty-ninth, eighteen hundred and seventy-six; and whenever, and as often as, any installments shall have been paid by the Mexican Republic on account of said awards, to distribute the moneys so received in ratable proportions among the corporations, companies, or private individuals respectively in whose favor awards have been made by said commissioners, or by the umpires, or to their legal representatives or assigns, except as in this act otherwise limited or provided, according to the proportion which their respective awards shall bear to the whole amount of such moneys then held by him, and to pay the same, without other charge or deduction than is hereinafter provided, to the parties respectively entitled thereto. And in making such distribution and payment, due regard shall be had to the value at the time of such distribution of the respective currencies in which the said awards are made payable; and the proportionate amount of any award of which by its terms the United States is entitled to retain a part shall be deducted from the payment to be made on such award, and shall be paid into the Treasury of

the United States as a part of the unappropriated money in the Treasury." (20 Stat. L., p. 144.)

Concerning this section the court said:

"2. The first section of the Act of 1878 authorizes and requires the Secretary of State to receive the moneys paid by Mexico under the Convention, and to distribute them among the several claimants, but it manifests no disposition on the part of Congress to encroach on the power of the President and Senate to conclude another Treaty with Mexico in respect to any or even all the claims allowed by the Commission, if in their opinion the honor of the United States should demand it. At most, it only provides for receiving and distributing the sums paid without a protest or reservation, such as, in the opinion of the President, is entitled to further consideration. It does not undertake to set any new limits on the powers of the Executive." (110 U. S., 63.)

The fifth section of the same act contained the following stipulation:

"SEC. 5. And whereas the government of Mexico has called the attention of the government of the United States to the claims hereinafter named with a view to a rehearing; therefore be it enacted, that the President of the United States be and he is hereby requested to investigate any charges of fraud presented by the Mexican government as to the cases hereinafter named, and if he shall be of the opinion that the honor of the United States, the principles of public law or considerations of justice and equity, require that the awards in the cases of Benjamin Weil and La Abra Silver Mining Company, or either of them, should be opened and the cases retried, it shall be lawful for him to withhold payment of said awards, or either of them until such case or cases shall be retried and decided in such manner as the governments of the United States and Mexico may agree, or until Congress shall otherwise direct. And in case of such retrial and decision, any moneys paid or to be paid by the Republic of Mexico in respect of said awards respectively, shall be held to abide the event, and shall be disposed of accordingly; and the said present awards shall be set aside, modified or affirmed as may be determined on such retrial: *Provided*, That nothing herein shall be construed as an expression of any opinion of Congress in respect to the character of said claims or either of them." (20 Stat. L., p. 145.)

The court interpreted this section as follows:

"The fifth section, as we construe it, is nothing more than an expression by Congress, in a formal way, of its desire that the President will, before he makes any payment on the Weil or La Abra claims, investigate the charges of fraud presented by Mexico, 'And if he shall be of the opinion that the honor of the United States, the principles of public law or considerations of justice and equity require that the awards * * * or either of them should be opened and the cases retried', that he will 'withhold payment * * * until the case or cases shall be retried and decided in such manner as the Governments of the United States and Mexico may agree, or until Congress shall otherwise direct.' From the beginning

to the end, it is, in form even, only a request from Congress to the Executive. This is far from making the President for the time being a *quasi* judicial tribunal to hear Mexico and the implicated claimants and determine once for all as between them, whether the charges which Mexico makes have been judicially established. In our opinion, it would have been just as competent for President Hayes to institute the same inquiry without this request as with it; and his action with the statute in force is no more binding on his successor than it would have been without. But his action as reported by him to Congress is not at all inconsistent with what has since been done by President Arthur. He was of opinion that the disputed 'Cases should be further investigated by the United States to ascertain whether this Government has been made the means of enforcing against a friendly power, claims of our citizens based upon or exaggerated by fraud,' and, by implication at least, he asked Congress to provide him the means 'of instituting and furnishing methods of investigation which can coerce the production of evidence or compel the examination of parties or witnesses.' He did report officially that he had grave doubts as to the substantial integrity of the Weil claim and the 'Sincerity of the evidence as to the measure of damages insisted upon and accorded in the case of the La Abra * * * Company.' The report of Mr. Evarts can not be read without leaving the conviction that if the means had been afforded the inquiries which Congress asked for would have been further prosecuted. The concluding paragraph of the report is nothing more than a notification by the President that unless the means are provided, he will consider that the wishes of Congress have been met, and that he will act on such evidence as he has been able to obtain without the help he wants. From the statements in the answer of Secretary Frelinghuysen in the *Key Case*, it appears that further evidence has been found, and that President Arthur, upon this and what was before President Hayes, has become satisfied that the contested decisions should be opened and the claims retried. Consequently, the President, believing that the honor of the United States demands it, negotiated a new Treaty, providing for such a reexamination of the claims, and submitted it to the Senate for ratification. Under these circumstances it is, in our opinion, clearly within the discretion of the President to withhold all further payments to the relators until the diplomatic negotiations between the two Governments on the subject are finally concluded. That discretion of the Executive Department of the Government can not be controlled by the judiciary." (110 U. S., 63.)

The Senate having refused its advice and consent to the treaty (referred to by the court) which the President had submitted to it, an assignee of the claimant Weil again sought to compel the Secretary of State to distribute the fund (part of which he was still retaining) on the ground that the President's lawful control of the fund continued merely during the pendency of the proposed treaty, and that he, therefore, was no longer rightfully withholding payment. The court, in declining to grant the mandamus asked for in this case, used the following language:

"It is contended, however, that, in this instance, the final custody of the money was vested by the act of June 18, 1878, solely in the Secretary of State, and that it was thereby made his duty to distribute and pay the awards to the claimants independently of the direction or control of the President. But the act thus referred to as the basis of this application, when considered throughout as it must be, not only does not undertake to impose the payment of these awards as an independent duty upon the Secretary, but specifically subjects such payment to the control of the President. The Secretary of State was, indeed, authorized and required by the first section to receive from Mexico the whole money awarded, and to distribute the same from time to time as the installments came in, among those in whose favor awards had been made, or to their legal representatives or assigns, but this was accompanied by the restriction, explicitly expressed, out of abundant caution, 'except as in this act otherwise limited or provided.'

* * * * *

"The principal propositions urged by counsel are, that 'the award made against Mexico in favor of Benjamin Weil remains a final and conclusive adjudication in favor of a citizen of the United States against a foreign government;' that 'the United States have not now and never have had any property, right or interest in the original claim or the award, or in the money paid in by Mexico to meet and satisfy it;' that 'the money so paid is, by the terms of a statute, in the official custody of the Secretary of State; the President of the United States has now no lawful control over it, and never had any lawful control over it, excepting for a temporary purpose during the pendency of a new treaty in the Senate; that control ended when the Senate rejected the new treaty.'

"These propositions have already been substantially disposed of by the decision of this court in *Frelinghuysen v. Key* (110 U. S., 63), from the principles announced in which we have no disposition to recede. It was there ruled, Mr. Chief Justice Waite delivering the opinion, that there was no doubt as to the conclusiveness of the awards under the convention of July 4, 1868, but that the language of the treaty was to be construed as used in a compact between two nations for the adjustment of the claims of the citizens of either against the other; that citizens of the United States having claims against Mexico were not parties to the convention; that while the claims of individual citizens were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one government to the other on account of the demands of their respective citizens; that, as between the United States and Mexico, the awards were final and conclusive until set aside by agreement between the two governments or otherwise; that the right of the United States to treat with Mexico for a retrial was unquestionable; that each government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection, as far as possible, against frauds and impositions by the individual claimants; and that where a fraudulent claim or false testimony was presented by a citizen for reference to the commission, this was an imposition on his own government, and it would be not only its right but its duty to repudiate the act, if it afterwards

discovered that it had in this way been made an instrument of wrong toward a friendly power." (*Boynton v. Blaine* [1890] 139 U. S., 306, 320-321.)

After quoting the essential portions (as already set forth above) of the opinion of the court in *Frelinghuysen v. Key* regarding the effect of the provisions of the statute of 1878 upon the powers of the executive, the court continued:

"The new convention was then pending in the Senate, and it was clear that the discretion of the executive department of the government to withhold all further payments to the relators until the diplomatic negotiations between the two governments on the subject were finally concluded, could not be controlled by the judiciary.

"This is conceded by the relator, and such a concession is inconsistent with the contention that the award was a final and conclusive adjudication in Weil's favor, as an individual, against Mexico. As between nations, the proprietary right in respect to those things belonging to private individuals or bodies corporate within a nation's territorial limits is absolute, and the rights of Weil can not be regarded as distinct from those of his government. The government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it. Under this convention it was the balance that was to be paid, after deducting from what was found in favor of one government that which was found in favor of the other. So that the moneys paid in liquidation of that balance belonged to the United States, to be increased by appropriation to the extent of the amounts allowed Mexico, and the aggregate to be distributed to the claimants as might be provided." (*Boynton v. Blaine* [1890] 139 U. S., 323.)

The opinion of the court concludes as follows:

"So long as the political branch of the government had not lost its control over the subject matter by final action, the claimant was not in a position, as between himself and his government, to insist on the conclusiveness of the award as to him. And while it is true that for the disposition of the case of *Frelinghuysen v. Key* it was sufficient that it appeared that diplomatic negotiations were pending which, as the court demonstrated, the act of 1878 in no manner circumscribed, it does not follow that the political department of the government lost its control because those negotiations failed.

"On the contrary, that control was expressly reserved, for it was made the duty of the President, if of opinion that the cases named should be retried, to withhold payment until such retrial could be had in an international tribunal, if the two governments so agreed, or in a domestic tribunal if Congress so directed, and, at all events, until Congress should otherwise direct. The fact that a difference of view as to whether the retrial should be international or domestic may have arisen and led to delay, or that such difference may have existed on the merits, does not affect the conclusion. The inaction of Congress is not equivalent to a direction by Congress. The political department has not parted with its power over the matter, and the intervention of the judicial department can not now be invoked." (*Boynton v. Blaine* [1890] 139 U. S., 325-326.)

On this general phase of the question and with reference to the power of the executive in the premises, it seems appropriate to incorporate the opinion of Attorney General Wirt (rendered July 27, 1824) on "The Judiciary and the Executive." Although those observations of the opinion which deal with the nature of the ownership in the fund have not finally been followed by any of the three branches of government, yet The Attorney General's remarks regarding the constitutional powers of the executive are timely and pertinent to the present discussion:

"I have examined the case of James L. Cathcart, which you have submitted for my opinion. The case is, that the commissioners under the Spanish treaty have allowed to Mr. Cathcart a sum of money which, according to his memorial, he alone was authorized to receive. It now appears that there are other claimants on this fund, under titles derived, or alleged to be derived, from Mr. Cathcart, to wit: 1. John Woodside, as trustee for Mrs. Cathcart; 2. Richard Smith, cashier of the office of discount and deposits of the United States, as assignee of J. Woodside; and, 3. William Robertson, holding a special lien on this Spanish claim from Mr. Cathcart, as additional security for the payment of certain bonds given by Mr. Cathcart to Mr. Robertson, for the purchase of a tract of land in Virginia, &c. Mr. Robertson has filed a bill in the chancery side of the court of the United States for the District of Columbia, by which he seeks to enforce this lien thus created in his favor by Mr. Cathcart. He controverts the claims of Mr. Woodside, Mrs. Cathcart, and Mr. Smith; and asks that the officers of the Government may be enjoined from paying the sum so awarded, to either of the other parties, &c. An injunction has been granted in conformity with this prayer. And the questions which you propound to me are—

"1. Whether, in any case, an injunction is binding on the executive department of the government? 2. If so, whether the injunction stated is binding on the officers of the treasury? 3. Whether the case submitted is such as to render it expedient to respect the injunction in this instance? 4. If not, in whose name, (according to the state of the case as presented by the documents accompanying your letter) can a warrant legally issue? On the first and second questions, I am of the opinion that it is not in the power of the judicial branch of our government to enjoin the executive from any duty specially devolved on it by the legislative branch of the government, or by the constitution of the United States. If it were otherwise, it would be in the power of the judicial branch of the government to arrest the whole action of the other two branches.

"My opinion is, that the judiciary can no more arrest the executive in the execution of a constitutional law, than they can arrest the legislature itself in passing the law. It would be easy to show that the existence of such a power in the judiciary would place the existence, not only of the government, but of the nation itself, at the mercy of that body, in every crisis both of war and peace. It is, therefore, in my opinion, essential to the government itself to assert, for the executive branch, this independence of action. Yet, nevertheless, I am of the opinion that there are cases in which the courts will be found a useful auxiliary

to the executive, and promotive of the purposes of justice, to abide the decision of a court. Where a law, for example, is so formed, or the evidences of rival claims are so poised, as to render it doubtful which, of several individuals, is entitled to the benefit of a private law, and the parties have commenced a litigation before a court by which their relative rights are to be adjusted, I can perceive no inconvenience; but, on the contrary, much convenience which would result to the executive department from their accepting the aid of a court in adjusting the relative rights of the parties.

"The forms of proceeding in court give them advantages for the fair settlement of these controversies which are not enjoyed by the Executive. The permitting a judicial tribunal, therefore, to draw such subjects to its arbitraments is calculated to relieve the Executive from a very onerous burden, which the judiciary can bear to more advantage; it is calculated to promote the purposes of private justice; and, at the same time, leaves the Executive in full possession of the principles of independence which I have mentioned, whenever the public good shall call for its exercise. I am, therefore, of the opinion, that in all cases in which the government is a mere stakeholder, and several individuals are claiming the benefit of a fund, with regard to which it is immaterial to the government and the essential purposes of the law whether it be ascertained to be due to the one individual or the other, the officers of the treasury would exercise a sound discretion in referring them to the courts for the decisions of their respective rights; or, if persons so circumstanced shall have spontaneously commenced the litigation of their rights before a court, and the officers of the treasury shall have notice of the suit, by an injunction or otherwise, I should think it expedient for them to suspend their action under the law, until the court shall have decided on the subject. I would not advise those officers to acknowledge the jurisdiction of the court, by appearing to the suit as parties; this might involve them in expense and trouble. All that I would recommend, in such a case, is a forbearance to act until the court shall have decided; and a payment according to the decision, when the decision shall be finally made.

"To your third question, therefore, I answer that the case submitted is such a one as to render it expedient to respect the injunction to the extent that I have mentioned. All the preliminary steps in the adjustment of the accounts to the time of issuing the warrant may be gone through, without prejudice to any one; but I would recommend that the warrant be withheld until the court shall have decided who is entitled to the money, and then issued to the individuals so decided to be entitled. There are peculiar reasons which render this course especially proper at the present instance. Those may be found in the statement made by Mr. Catheart in his memorial to the commissioners, that *he alone* was entitled to receive the money, compared with his deed in favor of Mrs. Catheart, and his agreement with Mr. Robertson; and in the extract which you furnished me from the report of the commissioners. But I forbear to press these peculiar circumstances, because, under the general rule which I have already stated, I should think this a proper case to abide the decision of a court.

"This answer to your third question renders it unnecessary to answer your fourth.

"The documents are returned." (1 Op. Atty. Gen'l., 681-684.)

It is, therefore, believed that for all questions regarding the international phases (save as to such matters as were involved in the La Abra and Weil cases, discussed below) the executive may be regarded as possessing certain plenary powers. The exact delimitation of such powers would probably be difficult, and as the question is not pertinent to the present inquiry it will not be pursued.

Control by Congress

But it seems clear from the cases that in connection with these international phases Congress also may have (as just suggested) certain plenary powers. Indeed such powers were exercised in connection with the disposition of these same La Abra and Weil cases, when Congress later, in 1892, passed certain acts referring to the Court of Claims the question of whether or not the awards had been secured by fraud. The constitutionality of these acts being attacked, the Supreme Court in *La Abra Silver Mining Co. v. United States* ([1899] 175 U. S., 423) said:

"* * * * The question for the determination of which the present suit was directed to be instituted was whether the award made by the Commission in respect to the claim of the La Abra Company was obtained as to the whole sum included therein or as to any part thereof, by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the company, or its agents, attorneys or assigns. It can not, we think, be seriously disputed that the question whether fraud has or has not been committed in presenting or prosecuting a demand or claim before a tribunal having authority to allow or disallow it is peculiarly judicial in its nature, and that in ascertaining the facts material in such an inquiry no means are so effectual as those employed by or in a court of justice. The Executive branch of the Government recognized the inadequacy for such an investigation of any means it possessed, and declared that Congress by its 'plenary authority' ought not only to decide whether such an investigation should be made, but provide an adequate procedure for its conduct and prescribe the consequences to follow therefrom. The suggestion that the question of fraud be committed to the determination of a judicial tribunal first came from the Executive branch of the Government. Undoubtedly Congress, having in view the honor of the Government and the relations of this country with Mexico, could have determined the whole question of fraud for itself, and by a statute, approved by the President, or which being disapproved by him was passed by the requisite constitutional vote, have directed the return to Mexico, the other party to the award, of such moneys as had been paid into the hands of the Secretary of State. It is also clear that in the absence of any statute suspending the distribution of such moneys, the President could have ignored the charges of fraud and ordered the distribution to proceed according to the terms of the treaty and the award.

But it does not follow that Congress was without power, no distribution having been made, to control the whole matter by plenary legislation (pp. 459-460.)

"* * * It is therefore difficult to perceive any ground upon which to question its power to make the distribution of moneys in the hands of the Secretary of State—representing in that matter the United States and not simply the President—depend upon the result of a suit by which the United States would be bound and in which the claimants to the fund in question could be heard as parties, and which was to be brought in a court of the United States by its authority, for the purpose of determining whether the La Abra Company, its agents or assigns had been guilty of fraud in the matter of the claim that it procured to be presented to the commission. The act of 1892 is to be taken as a recognition, so far as the United States is concerned, of the legal right of the Company to receive the moneys in question unless it appeared upon judicial investigation that the United States was entitled, by reason of fraud practiced in the interest of that corporation, to withhold such moneys from it. Here then is a matter subjected to judicial investigation in respect of which the parties assert *rights*—the United States insisting upon its right under the principles of international comity to withhold moneys received by it under a treaty on account of a certain claim presented through it before the Commission organized under that treaty in the belief, superinduced by the claimant, that it was an honest demand; the claimant insisting upon its absolute legal right under the treaty and the award of the Commission, independently of any question of fraud, to receive the money and disputing the right of the United States upon any ground to withhold the sum awarded. We entertain no doubt these rights are susceptible of judicial determination within the meaning of the adjudged cases relating to the judicial power of the courts of the United States as distinguished from the powers committed to the Executive branch of the Government (pp. 460-461).

* * * * *

"Much was said in argument about the interference by the act of 1892 with the discharge by the President of his constitutional functions in connection with matters involved in the relations between this country and the Republic of Mexico. For reasons already given this contention can not be sustained. It is without support in anything done or said by the eminent jurists who have presided over the Department of State since the controversy arose as to the integrity of the claim made by the La Abra Company. On the contrary, those officers have uniformly insisted that the authority of Congress was plenary to determine whether the award in respect of those claims was procured by fraud practiced on the part of that Company and whether in that event the Company should be barred of any claim to the moneys received from the Republic of Mexico. Upon this question the legislative and executive branches of the Government have acted in perfect harmony. The question arises under the Constitution of the United States and a treaty made by the United States with a foreign country, is judicial in its nature, and one to which the judicial power of the United States is expressly extended. Both branches of the Government were concerned in the enactment subjecting that question to judicial determination, and it can not properly be said that the President by approving the act of 1892 or by recognizing

ing its binding force surrendered any function belonging to him under the supreme law of the land" (p. 462).

It is believed, however, that such plenary power of the Congress should be understood as referring to, and connected with, and indeed as auxiliary to, the fulfillment of certain of our international obligations in such matters, and that the power should be exercised in affording means for carrying out such obligations where such means do not reside in the executive; for example, the determination of the question of whether fraud has or has not been practiced being a question which under our system is distinctively judicial rather than executive, and, moreover, the executive not having the machinery necessary adequately to conduct a judicial investigation, Congress has plenary power in the matter for the purpose of determining how that judicial question regarding fraud shall be determined. It is thought that the language of the cases should be understood in this sense rather than in the sense that the Congress as such has any part or function in the political branch of the government or in the performance of the duties of that branch.

But it would seem equally clear and sound with reference to the jurisdiction of Congress that when these funds have been received and the international aspects have been cleared up, then the funds being national funds their distribution is a matter in which the Congress has plenary jurisdiction if it chooses to act, and that Congress having acted either on a specific case or by general legislation the distribution must be made under such rules and regulations as the Congress has seen fit to provide.

In this connection, and with reference to the statement of the court regarding the agreement between the executive and legislative branches of the government regarding the plenary nature of the powers of the Congress in the premises, the following extracts from letters from Secretary Evarts to the President, in which is used the expression referred to by the court, should be considered.

In a letter to the President dated August 13, 1879, and marked "confidential," Secretary Evarts said, in connection with an investigation of the fraud charged in the La Abra and Weil cases:

"The authority for such an investigation must proceed from Congress. I would advise, therefore, that the proofs and conclusions you shall come to thereon, if adverse to the immediate payment on these awards of the installments re-

ceived from Mexico, be laid before Congress for the exercise of their plenary authority in the matter." (Ex. Doc. No. 103, 48th Cong., 1st sess., p. 582.)

In a letter to the President dated April 30, 1880, on the same general subject, Secretary Evarts used this language:

"The parties interested in these awards have from time to time preferred requests for a renewed consideration by the Executive of the questions arising for his determination under the act of Congress of June 18, 1878, and have particularly insisted that, in deciding against opening these awards diplomatically and reexamining them by a new international commission, the whole discretion vested in the Executive as a part of the treaty-making power and under the special provision of the act of Congress was exhausted, and that the payments should be no longer suspended in respect of these cases, or either of them. A solicitous attention to the rights of the claimants and the duty of the Executive in the premises has confirmed me in the opinion that Congress should determine whether 'the honor of the United States' requires any further investigation in these cases, or either of them, and provide the efficient means of such further investigation if thought necessary.

* * * * *

"While these considerations led to the conclusion that these cases ought not to be made the subject of a new international commission, I was yet of opinion that 'the honor of the United States' was concerned to inquire whether in these cases submitted by this Government to the Commission its confidence has been seriously abused, and the Government of Mexico, acting in good faith in accepting a friendly arbitration, had been subjected to heavy pecuniary imposition by fraud and perjury in the maintenance of these claims, or either of them, before the Commission. In furtherance, however, of this opinion it seemed to me apparent that the Executive discretion under the act of Congress, could extend no further than to withhold further payments on the awards until Congress should, by its plenary authority, decide whether such an investigation should be made, and should provide an adequate procedure for its conduct, and prescribe the consequences which should follow from its results." (Ex. Doc. 103, 48th Cong., 1st sess., pp. 742, 743.)

The opinion of the committees of the House of Representatives on this matter is not without interest. In 1877 the Committee on Foreign Affairs, reporting on a proposed joint resolution directing the Secretary of the Treasury to pay no more moneys on the La Abra and Weil claims until further information was obtained by Congress, said:

"The committee are of the opinion that the House of Representatives has no jurisdiction over the subject matter referred by the joint resolution, and that the Mexican Republic has not made, and could not properly make, any application to the legislative department of this government.

* * * * *

"The committee do not wish to be understood as expressing any opinion upon the questions of fraud and perjury suggested by the representatives of Mexico, *as indicated by the resolution referred to this committee*, nor as saying that any application which has been or may be made by Mexico to the executive department of this government should not be entertained by it, or that the relief sought should not be granted. It is the opinion of the committee that the question presented, in so far as it relates to payment of money under the awards received from Mexico, is entirely within the jurisdiction and discretion of the treaty-making power under the Constitution, and that the Executive is, with the concurrence of the Senate, fully empowered to open negotiations with Mexico by further treaty, if the two powers can concur therein, to accomplish the relief asked for; and if, in the opinion of the President, such frauds have been practiced as to entitle Mexico to relief, this committee would be gratified to know that proper steps would be taken to that end." (House Report No. 27, 45th Cong., 2d sess., pp. 6 and 8.)

Later, in 1886, Mr. Daniel, of the Committee on Foreign Affairs, submitting the majority report of the committee, said:

"HAS CONGRESS THE CONSTITUTIONAL POWER TO REOPEN THE AWARD AND ORDER A NEW TRIAL?"

"We have no doubt that Congress may waive the benefits of the treaty with Mexico and reopen the case decided in favor of La Abra Company. Sir Edward Thornton took such power for granted as an attribute of our national sovereignty. The existence of such power is sustained by a number of precedents, and to a certain extent it has already been exercised by Congress in the act of 1878 suspending payment of the sums awarded, and of which the present bill is amendatory. The President assumes and the Secretary of State asserts it, and in *Key v. Frelinghuysen* the Supreme Court affirmed it."

"While we thus recognize the power of Congress to intervene, we must not forget the circumstances under which intervention is asked, nor fail to remember that only extraordinary and very cogent circumstances would warrant it." (House Report No. 3474, 49th Cong., 1st sess., pp. 1, 2.)

Still later, in 1892, Congress passed the acts providing for the litigation in the Court of Claims of the question whether or not fraud existed in these cases.

In 1896 Congress passed a general act (quoted hereinafter) providing a method for distribution of all funds of this general character received from foreign governments, so that at the present time the international phases being finished, the national phase attaches under a permanent statute giving certain powers and imposing certain duties on the Secretary of State.

NATURE OF PRIVATE OWNERSHIP IN THE AWARDS

But in connection with this doctrine of the plenary powers of the executive on the one hand and Congress on the other and notwithstanding the doctrine developed and acted upon in the Mexican cases,

(*Frelinghuysen v. Key and La Abra Silver Mining Co. v. Frelinghuysen* [1883] 110 U. S., 63; *Boynton v. Blaine* [1890] 139 U. S., 306; *U. S. v. La Abra Silver Mining Co.* [1894], 29 Ct. Cl., 432; *U. S. v. Weil* [1894] 29 Ct. Cl., 523 *supra*; and *La Abra Silver Mining Co. v. U. S.*)

and in the Alabama Claims cases,

(*Bachman v. Lawson* [1883] 109 U. S., 659; *Great Western Insurance Co. v. U. S.* [1884] 19 Ct. Cls., 206, same case on appeal [1884] 112 U. S., 193; *U. S. v. Weld* [1888] 127 U. S., 51; and *Williams v. Heard* [1890] 140 U. S., 529.)

that the funds received from foreign governments in settlement of the claims of American citizens against such governments are national funds of the United States, and that "no individual claimant has as a matter of strict legal or equitable right, any lien on the fund awarded, nor is Congress under any legal or equitable obligation to pay any claim out of the proceeds of such a fund," though "there is, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who suffered the losses" (*Williams v. Heard*, *supra*), yet beginning with *Comegys v. Vasse* ([1828] 1 Peters, 193), there have been before the Supreme Court of the United States a score of cases dealing with the ownership of such claims as between private parties, the contests, in most if not all of the cases, arising out of transactions which antedated (often by several years) the recovery and distribution of the award. These various litigations have been—

Between the assignee in bankruptcy [who prevailed] and the bankrupt;

(*Comegys v. Vasse* [1828] 1 Peters, 193; *Phelps v. McDonald* [1878] 99 U. S., 298; *Williams v. Heard* [1890] 140 U. S., 529.)

Between the assignee in bankruptcy and the personal assignee of the bankrupt (bills dismissed by Supreme Court for want of jurisdiction);

(*Gill v. Olivers Ex's.* [1850] 11 How., 529; *Williams Trustee v. Oliver* [1851] 12 How., 111; *Williams Trustee v. Oliver* [1851] 12 How., 125.)

Between a judgment creditor of the insolvent assignor and the personal assignee [who prevailed] who was also the assignee of a trustee;

(*Deacon v. Oliver* [1852] 14 How., 610.)

Between the administrator of a bankrupt's estate and the executor of the assignee of a trustee in bankruptcy, such assignee being also the personal assignee of the bankrupt [bill dismissed];

(*McBlair v. Gibbes* [1854] 17 How., 231.)

Between the administrator of a bankrupt's estate [who prevailed] and the executor of the assignee of a trustee in bankruptcy;

(*Williams v. Gibbes* [1854] 17 How., 239; *Gooding v. Oliver* [1854] 17 How. 274.)

Between the assignee of a subassignee [who prevailed] and the administratrix of the claimant;

(*Lewis v. Bell* [1854] 17 How., 616.)

Between an assignee of the claimant, and an assignee of the assignee, i. e., a subassignee [who prevailed];

(*Pugh v. Porter* [1885] 112 U. S., 737.)

Between a subassignee [who prevailed] and a person claiming as the assignee of a subassignee;

(*Porter v. White* [1888] 127 U. S., 235.)

Between the assignee [who prevailed] of a trustee in bankruptcy, such assignee being also the personal assignee of the bankrupt, for services rendered by the assignee in collecting the fund, and the administrator of the bankrupt;

(*Williams v. Gibbes*, and *Gibbes v. Williams* [1857] 20 How., 535.)

Between the trustee in bankruptcy [who prevailed] on behalf of the creditors and the administrator *de bonis non* of the bankrupt's estate, for the benefit of the heirs and distributees;

(*Mayer v. White* [1860] 24 How., 317.)

Between attorneys in fact [who prevailed], suing for services in collecting, and the claimant;

(*Bachman v. Lawson* [1883] 109 U. S., 59.)

Between an attorney at law [who prevailed] employed by brother of claimant (seemingly acting as agent) and the administrator of the claimant's estate;

(*Wylie v. Coxe* [1853] 15 How., 415.)

Between a judgment creditor, joined by an assignee in bankruptcy [who prevailed], and the bankrupt, who was guilty of fraud in connection with bankruptcy proceedings;

(*Clark v. Clark* [1854] 17 How., 315.)

Between a State receiver upon a judgment taken *pro confesso* and an assignee [who prevailed] under bankruptcy proceedings;

(*Booth v. Clark* [1854] 17 How., 322.)

Between prior assignee and subsequent assignee [who prevailed] of the same claim, only the latter party filing his assignment with the Department of State;

(*Judson v. Corcoran* [1854] 17 How., 612.)

Between rival claimants.

(*Frevall v. Bache* [1840] 14 Peters, 95.)

In all these cases there is more or less discussion of the nature of the interest which a claimant has in a fund secured from a foreign government in settlement of injuries inflicted upon the claimant by that government, but the subject was particularly treated in *Comegys v. Vasse*, *Frevall v. Bache*, *Deacon v. Oliver*, *Mayer v. White*, *Judson v. Corcoran*, *Phelps v. McDonald*, *Bachman v. Lawson*, *Williams v. Heard*, *U. S. v. La Abra Silver Mining Co.* (Ct. Cls.), *Pugh v. Porter*, and *Porter v. White*. In these cases the courts have made various statements regarding the nature of the right possessed by the claimant in the award, the more important of which may be stated as follows:

(1) That there is no element of donation or gratuity in the receipt by the claimant from the government of the award made against a foreign government (*Comegys v. Vasse*, *Williams v. Heard*, *Phelps v. McDonald*);

(2) That the claimant's rights in connection with his claim are vested rights (*Comegys v. Vasse*);

- (3) That the claim has about it and indeed constitutes a "spes recuperandi" (*Comegys v. Vasse*);
- (4) That the claimant's interest in the fund constitutes a chose in action (*Judson v. Corcoran*);
- (5) That the interest may be bought and sold, assigned, devised, or pass to legal representatives (*Comegys v. Vasse*, *Williams v. Heard*, *Pugh v. Porter*, *Porter v. White*);
- (6) That the right of the claimant is a possibility, coupled with an interest (*Phelps v. McDonald*, *Williams v. Heard*); and
- (7) That it is immaterial that the claimant has no remedy against his government, save as it is specifically given, since in these cases at least there may be a right without a remedy (*Comegys v. Vasse*, *Williams v. Heard*, *Phelps v. McDonald*).

But see as to all these points *Blagge v. Balch* (1895), 162 U. S., 439, which appears to be decided upon the principle that Congress may legally do with such claims whatever it desires and sees fit.

But in connection with all of these cases, and as showing that the statements and arguments therein made do not in any wise infringe upon the fundamental proposition that awards received are national funds belonging to the United States and not to the claimants, and that the nation, by one governmental branch or another, has plenary authority to deal with such funds as it may see fit, attention is called to the observation of Mr. Chief Justice Waite who, in laying down the doctrine as to the fundamental rights and powers of the United States with reference to such funds, said, concerning the cases that had been cited to him as holding a contrary doctrine:

"None of the cases cited by counsel are in opposition to this. They all relate to the disposition to be made of the proceeds of international awards after they have passed beyond the reach of the government and into the hands of private parties. The language of the opinions must be construed in connection with this fact." (*Frelinghuysen v. Key*, supra.)

The cases cited to and before the court when this statement was made seem to have been *Comegys v. Vasse*, *Clark v. Clark*, *Judson v. Corcoran*, *Phelps v. McDonald*, and *Gibbes Case*, 13 Opinions Attorney General, 19 (Ex. Doc. 103, 48th Cong., 1st sess., p. 726).

Moreover, in this connection, it must not be overlooked that both the courts and Congress have regarded and have treated awards made to individuals in international commissions (Mexican Claims Commission of 1868) and awards made to the United States in a lump

sum and afterwards distributed among the claimants (as the Alabama Claims), as of the same nature and character so far as the rights of claimants thereto are concerned; that the courts have seemingly refused to recognize any fundamental difference, so far as the rights of claimants are concerned, between claims of the latter class to satisfy which there is a payment of a lump sum which is subsequently distributed among the claimants (Alabama Claims) and claims which this government by treaty releases as against a foreign government and to pay which it afterwards appropriates money from its own treasury (see Treaty of Guadalupe-Hidalgo; see Great Western Insurance Co. *v.* U. S.); and that as to the releasing of claims and the subsequent granting of compensation for such claims to those suffering the injury, Congress may and has arbitrarily and seemingly irrespective of any other rights that might have been created by assignments, sales, bankruptcy proceedings, etc., designated the beneficiaries of such funds, thus acting on the principle, which indeed is established by such action, that the money it paid was a pure donation or gratuity by this government (French Spoliation Claims).

Upon this phase of the matter, the Supreme Court, in handing down an opinion concerning the respective rights of parties claiming under the acts of Congress dealing with "*French Spoliation*" Claims, said:

"Under the act of January 20, 1885, the claims were allowed to be brought before the Court of Claims, but that court was not permitted to go to judgment. The legislative department reserved the final determination in regard to them to itself, and carefully guarded against any committal of the United States to their payment. And by the act of March 3, 1891, payment was only to be made according to the proviso. We think that payments thus prescribed to be made were purposely brought within the category of payments by way of gratuity, payments as of grace and not of right.

* * * * *

"Manifestly the claims involved in these cases do not come within the rule laid down in *Comegys v. Vasse* and *Heard v. Williams*, and, without intimating any opinion on their merits, the legislation seems to us plainly to place them within that applied in *Emerson's Heirs v. Hall*, though the circumstances are not the same. [In this Emerson case, it was held that the fund involved — a pension — was a donation or gratuity.]

* * * * *

"As we have seen, the Court of Claims had informed Congress that their view was that the action of the United States came within the constitutional provision as to the taking of private property for public use, and hence that Congress was bound to pay the claimants what was due them by reason of such taking, and fur-

ther that they had accordingly made awards in favor of assignees in bankruptcy. But Congress declined to accept the views of the Court of Claims and to treat these claims as property of the original claimants, transferable and transmissible like other property of the nature of choses in action, and expressly provided that the awards should be made to the next of kin instead of the assignees in bankruptcy." (*Blagge v. Balch* [1895] 162 U. S., 439.)

Moreover, the action of Congress in the matter of the Alabama Claims was to the same effect when it provided in section 15 of the Act of June 23, 1874 (18 Stats., 245), that the commission should allow attorneys' fees to those representing the claimant before the commission, but that "all other liens upon, or assignments, sales, transfers, either absolute or conditional for services rendered or to be rendered about any claim or part or parcel thereof provided for in this bill heretofore or hereafter made or done before such judgment is awarded and the warrant issued therefor, shall be absolutely null and void and of no effect." (See for interpretation of this *Bachman v. Lawson* [1883] 109 U. S., 659.)

It should be observed, in closing this head of the discussion, that the real relationship existing between a claimant and the international award made in settlement of his claim, and the exact nature of the utmost rights which under the cases and the acts of Congress the claimant has in the fund when collected, prior to any act of distribution by the government, are, it is believed, set forth succinctly and most clearly in *Williams v. Heard*, where the court says:

"It was held in *United States v. Weld* (127 U. S., 51) that this award was made to the United States as a nation. The fund was, at all events, a national fund to be distributed by Congress as it saw fit. True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as justice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in the payment of such losses. But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund.

* * * * *

"There was, undoubtedly, a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the Confederate cruisers; and in this sense all the claims of whatsoever nature were possessed of greater or less pecuniary value. There was at least a possibility of their payment by Congress—an expectancy of interest in the fund, that is, a possibility coupled with an interest.

* * * * *

"Was the claim in this case property, in any sense of the term? We think it was. Who can doubt but that the right to prosecute this claim before the Court of Commissioners of Alabama Claims would have survived to their legal representatives had the original claimants been dead at the passage of the act of 1882? If so, the money recovered would have been distributable as assets of the estate. While, as already stated, there was no means of compelling Congress to distribute the fund received in virtue of the Geneva award, and while the claimant was remissile with respect to any proceedings by which he might be able to retrench his losses, nevertheless there was at all times a moral obligation on the part of the government to do justice to those who had suffered in property. As we have shown from the history of the proceedings leading up to the organization of the tribunal at Geneva, these war premiums of insurance were recognized by the government of the United States as valid claims for which satisfaction should be guaranteed. There was thus at all times a possibility that the government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property; rights, it is true, that were not enforceable until after the passage of the act of Congress for the distribution of the fund. But the act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the act of Congress did was to provide a remedy for the enforcement of the right.

"The claims in this case differ very materially from a claim for a disability pension, to which they are sought to be likened. They are descendible; are a part of the estate of the original claimants which, in case of their death, would pass to their personal representatives and be distributable as assets; or might have been devised by will; while a claim for a pension is personal, and not susceptible of passing by will, or by operation of law, as personality.

"Neither do we think that the money appropriated by Congress by the act of 1882 to pay these claims should be considered merely as a gratuity." ([1890] 140 U. S., 529.)

THE POWERS AND DUTIES OF THE SECRETARY UNDER THE STATUTE

With these principles in mind as to the rights, powers, and duties of the government on the one hand, particularly the fact that such moneys are national funds, and the rights of the claimants on the other, particularly the fact that they possess as to such funds no strict legal or equitable right, but only and at most a moral interest, there is now to be considered the powers and the duties of the Secretary of State in the matter of distributing these funds.

Reverting to the principles laid down at the beginning of the discussion and to the two stages involved in international reclamations, it is evident that the Alsop claim having been adopted by the government, and its validity and amount having been determined by the

Amiable Compositeur, the international phase (in the absence of elements not appearing in this case) has been closed, and the second stage, that having to do with the distribution of the award under municipal law, has begun. Or, to put it in another form, the municipal jurisdiction has now attached and hereafter the fund is to be handled entirely under the provisions of national law.

Further, and reverting to the discussion had above regarding the two powers involved in the national disposition of international awards, i. e., the executive and the legislative and to the functions of each respectively, it is submitted that normally the executive power having attached and become exhausted, either by reason of the settlement of international differences that may have arisen regarding the award, or by reason of the fact that no such differences have arisen, then the legislative power attaches and controls. Now, in the exercise of this jurisdiction which it possesses, Congress has passed a general statute (quoted hereinafter) providing in the first place that such awards shall, by the Secretary of State, be covered into the Treasury [which under the Constitution (Art. I, sec. 9) makes the fund thereafter wholly subject to the control of Congress (*Great Western Insurance Co. v. U. S.* [1884] 19 Ct. Cls., 206)], and in the second place appropriating them for payment to the holders of certain certificates issued by the Secretary of State. So soon, therefore, as such moneys are deposited by the Secretary of State in the Treasury, they become subject to the statute. It is submitted, that the Secretary of State, in proceeding under the statute, is essentially and primarily acting as a quasi judicial and special tribunal for the performance of specified municipal functions in the determination of certain phases of the municipal jurisdiction (to determine which the Secretary is, by reason of his primary duties, better able than any other person or tribunal) rather than as an executive officer charged with the conduct of our foreign relations and matters necessarily incident thereto. All of the discussion following is based upon this as a fundamental principle.

It should also be observed that in all of the cases cited above in which is discussed the rights of claimants *vis a vis* one another, and *vis a vis* the government, the jurisdiction of the courts, as invoked by the parties litigant, attached immediately after the international phase of the claim had been finished and before any determination was made under specific municipal laws (except probably in the Mexican Claims Commission of 1868) and such principles as were

announced and such statements as were made by the court in these cases should be read with this fact in mind; and that since these cases arose Congress has enacted this general legislation (above referred to) having to do with the distribution of international awards from the standpoint of municipal law; and, finally, that under this law as it now stands (the statute having been enacted since all of the cases above cited were decided except the *La Abra Silver Mining Company v. United States* and *Blagge v. Balch*, in neither of which was the statute involved or cited) the first step in the exercise of this municipal jurisdiction in the determination of the ownership and distribution of the award is devolved upon the Secretary of State.

The statute in question, that of February 27, 1896 (29 Stat., p. 32), under which the Secretary will act in this case, reads as follows:

"Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury.

"The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

"Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for."

As already stated, there is no reported case under this statute, which is, therefore, without recorded judicial construction as to its scope, meaning, or purpose. It is, however, understood that a number of cases have arisen under the statute, involving the question of the right of individuals to compel under this act the action of the Secretary of State by mandamus and injunction and that in each case the courts have held that the Secretary's discretion is uncontrollable by such a writ.

Prior to the statute funds received from foreign governments in settlement of American claims had either been dealt with pursuant to and in accordance with some special direction of Congress (e. g., French Convention of 1831; Mexican Convention of 1839; Brazilian Convention of 1849; Alabama Claims, 1871; Mexican Convention of 1868), or the Secretary of State had distributed the fund without such special authority, and apparently under the general powers possessed by him through the President to conduct our foreign relations, which has been considered, rightly it is thought, to include the

adjustment and settlement of the claims of American citizens against foreign governments, including payment of the funds received to the parties suffering the injury. On this point of distribution, in the absence of a controlling statute, the following statement, taken from Moore's Digest of International Law, is of interest and value:

"I am under the impression that the payment by diplomatic agents, either directly or through this Department, to claimants on foreign governments of moneys which may be recovered from such governments in satisfaction of claims, is, to say the least, irregular, and imposes responsibility where it does not properly belong." (Mr. Clayton, Sec. of State, to Mr. Shields, May 19, 1849, MS. Inst. Venezuela, I. 77.)

"In revising Wharton's Digest you may care to have the result of my examination of the subject mentioned in volume 2, page 70¹ section 245, which I made yesterday, in pursuance of your kind permission.

"Secretary Clayton not only directed Mr. Shields to remit to the Treasury Department moneys which he might receive from the Venezuelan Government in satisfaction of private claims to be by that Department distributed among those who might be legally entitled to the same, but he very clearly indicated that this was the only correct practice, and leaves it to be inferred that it should be followed by all diplomatic officers in the future.

"The impression created by the extract printed in Dr. Wharton's Digest is that this practice was inaugurated in 1849 by Mr. Clayton and continued.

"As a matter of fact Mr. Shields was authorized by instruction of October 15, 1849, to pay moneys received and to be received from the Venezuelan Government in a certain case to the assignees of the claimants, who were then in Venezuela, and Mr. Shields reports in his last dispatch, dated January 6th, 1850, that "the receipt for this payment as well as the receipts for payments to the parties interested of the amounts realized in all the other cases of indemnity brought to a close during my term of service, are left on file in the archives of the legation."

"On February 28th, 1852, the Department instructed Mr. Steele, who was Mr. Shield's successor, to remit to the attorney of the claimant in the case of the *Constancia* any money which he might receive from the Venezuelan Government on account of the claim in that case. Throughout the correspondence, during Mr. Webster's and Mr. Cass's administrations (and also Mr. Marcy's), it is made clear that the practice of paying by diplomatic agents directly to claimants on foreign governments of moneys recovered from such governments in satisfaction of claims was approved.

"I have not learned when this practice was changed by the Department, but I am satisfied that Mr. Clayton's plan of having the proceeds of foreign claims forwarded to the Treasury Department, as set forth in his instructions to Mr. Shields, was never insisted upon; indeed, it was wholly impracticable. Having been received at the Treasury, such moneys could not have been distributed to the parties in interest without an appropriation by Congress." (Letter of E. I.

Renick, sometime chief clerk of the Department of State, to Mr. Moore, Assist. Sec. of State, May 27, 1898, MS.)" (Moore's Int. Law Digest, Vol. VI, pp. 1030-1031.)

A perusal of the statute will show that it contemplates four operations by the Secretary of State:

- (1) The receipt of the money from the foreign government or other source;
- (2) The covering of the same into the Treasury;
- (3) The determining of the amounts due claimants respectively from such funds;
- (4) The certification of the same to the Secretary of the Treasury by the issuance of certificates.

In the present case operations (1) and (2) have been already performed; it remains to carry out (3) and (4).

The third point itself involves two processes: (a) The determination of who the claimants are, and (b) the determination of the amounts due them.

A study of the statute makes it clear that the whole question of the extent of the jurisdiction conferred by this law upon the Secretary of State depends upon the meaning and interpretation to be given to the word "*claimants*" as used therein — the question being, What persons or classes of persons are to be held as covered by it?

It must, in the first place, be said that an examination of this question makes it quite evident that, under the cases, the persons who have interests in any such fund as this may be readily classified in two groups: (1) those having initial or primary rights, that is, those who have rights by reason of having suffered the injury at the hands of the foreign government, who will, under normal conditions, be those for whom this government intervenes; and (2) those who have secondary or derivative rights, that is, rights arising either by operation of law or out of transactions between themselves and the persons having the primordial rights. These will be such rights, for example, as result from inheritance, assignments, bargain and sale, etc.

Does the term "claimant", as used in the statute, include one or both of these general classes?

It may, in the first place, be observed that the term "claimant" has in international reclamations, so far as diplomatic discussion is concerned, a perfectly definite meaning, that is, the person who has been injured and for whom the government intervenes. It has in such con-

nnection became a term of art. This is so clear as to require no specific citation of authority. It is true that the term has been somewhat loosely employed in some international arbitrations to designate the one prosecuting the claim before the tribunal, even though such person be the agent, attorney, or even assignee of the original claimant, but this use must, it would seem, be regarded rather as one of convenience for the purposes of the particular case than as a primary meaning, since the general rule shows quite clearly that the term "claimant" in international reclamations is used to designate those having the primary or primordial right — those who suffered the injury — and not those holding derivative rights.

If the Secretary, in distributing a fund, acts under his constitutional right as the one charged with the conduct of foreign relations, and not under the statute, there would appear to be no question but that this meaning of the term "claimant" (i. e., one who suffered the injury and for whom the government intervened) would be regarded as controlling, since the Secretary's powers and duties would cease when the person suffering the injury had received settlement therefor. The Secretary would not be concerned (in the sense of adjudicating thereon) with the rights of those holding secondary or derivative interests, who, their rights involving wholly judicial questions, would be remanded to the courts. It was the consistent policy of the Department prior to the enactment of the statute of 1896 to refer contesting parties to the courts (1 Op., 681; 5 Op., 135; id., 670; Bayard *v.* White [1888] 127 U. S. 246; Porter *v.* White [1888], 128 U. S. 235; 21 Op. Solicitor, 404), though at the same time the Department has, where no dispute existed between the parties as to their rights, paid out all or parts of any given award to persons standing in such derivative relation as assignee or vendee.

Does the statute, using the term in connection with municipal law, alter the primary meaning of the word?

On this branch of the inquiry it may first be observed that the courts in dealing with international claims have themselves more or less uniformly used the term to designate those having the primordial interest, that is, those who suffered the injury. For example, in *Frelinghuysen v. Key*, *supra*, which involved the very question of distribution, the court said, after pointing out that the convention under which the claims were to be adjudicated was between the two governments:

"By the terms of the compact the *individual claimants* could not themselves submit their claims and proofs to the Commission to be passed upon."

Again, speaking of the power conferred by the fifth section of the Act of 1878, the court said:

"This is far from making the President for the time being a quasi judicial tribunal to hear Mexico and the implicated *claimants*, and determine once for all as between them, * * * ."

Further on the court said:

"The United States, when they assumed the responsibility of presenting the claims of their citizens to Mexico for payment, entered into no contract obligations with the *claimants* to assume their frauds and to collect on their account all that, by their imposition of false testimony, might be given in the awards of the Commission. As between the United States and the *claimants*, the honesty of the claims is always open to inquiry for the purpose of fair dealing with the government against which, through the United States, a claim has been made."

In the case of *Alling v. United States* ([1884] 114 U. S. 563), where a company, having against Mexico a claim which this government submitted and on which an award was made, sued for certain funds in connection therewith, the court said:

"*Claimants* in this case having received the sum specifically awarded to them, appealed to the Secretary for the whole or a part of the sum for customs duties, which was awarded to the United States under assignment of Belden and Company. This was refused, and this suit is brought to enforce the claim."

And again,

"Not only is the Court of Claims forbidden to entertain jurisdiction of this claim, but the Secretary of State is by law authorized and directed to do all that can be done for *claimants*, without further legislation."

The law to which the court refers (already quoted *supra*) provided that the Secretary of State should "distribute the moneys so received * * * among the corporations, companies, or private individuals respectively in whose favor awards have been made * * * and to pay the same * * * to the parties respectively entitled thereto".

The same use of the term *claimant* is made all through the case of *Boynton v. Blaine* ([1890] 139 U. S., 306) — another case in which a mandamus was sought against the Secretary of State — the court making, among numerous similar expressions, the following statement:

"So long as the political branch of the Government had not lost its control over the subject matter by final action, the *claimant* was not in a position, as

between himself and his government, to insist on the conclusiveness of the award as to *him*."

In the *La Abra Silver Mining Company v. United States* ([1899] 175 U. S., 423) involving the relation of claimants to an international award, the court used this language:

"The money in the hands of the Secretary of State was paid to the United States by Mexico, pursuant to the award of the Commission. That tribunal dealt only with the two Governments, had no relations with *claimants*, and could take cognizance only of claims presented by or through the respective governments. No *claimant*, individual or corporate, was entitled to present any demand or proofs directly to the commission. * * * And 'each government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection so far as possible against frauds and impositions by the individual *claimants'* * * * As between the United States and Mexico, indeed as between the United States and American *claimants*, the money received from Mexico under the award of the Commission was in strict law the property of the United States, and no *claimant* could assert or enforce any interest in it so long as the government legally withheld it from distribution" (p. 458).

It seems, therefore, clear from what has gone before that the term "claimant" is, in international affairs, used both by the executive and the courts primarily to indicate those having the primordial interest in the claim; i. e., those who suffered the injury at the hands of the foreign government. This being true, the Secretary's jurisdiction under the statute of 1896 would, as far as the use of this term is concerned, appear to be confined to determining who those are who suffered the direct injury at the hands of the foreign government, and the amounts respectively due them in adjustment of such injury.

But there are other considerations, equally applicable and persuasive, which lead to the same conclusion regarding the extent of the meaning which should be given to this term and the consequent jurisdiction of the Secretary of State.

The authority to determine the amounts due the respective claimants, as that term is understood and defined, involves the exercise of quasi judicial powers. Now it is notorious that the executive is not circumscribed, certainly in the absence of direct and express congressional authorization, to exercise such powers properly and effectively, save in a limited and circumscribed way. For instance, the executive can not bring in absent or unwilling parties; it can not summon and compel the attendance of witnesses; or witness being present, it can not

control their conduct nor compel their testimony; it can not administer oaths or affirmations; it can not punish for contempt; it can not enforce its determinations; and it lacks generally those powers to which the judiciary looks for its effectiveness. This inherent deficiency was pointed out to Congress by the executive in connection with the La Abra and Weil cases when in a letter from the Secretary of State to the President, approved by the President, and suggesting that Congress act, it was said:

"The Executive Government is not furnished with the means of instituting and pursuing methods of investigation which can coerce the production of evidence or compel the examination of parties and witnesses." (Sec. Evarts to the President, Aug. 13, 1879, Ex. Doc. 103, 48th Cong., 1st sess., p. 582.)

In a later letter (April 13, 1880) Mr. Evarts reaffirmed these statements. (*Id.*, p. 742.)

The Supreme Court recognized the validity of this criticism in delivering its opinion in the *La Abra Silver Mining Company v. United States* ([1899] 175 U. S., 423) when it said:

"It can not, we think, be seriously disputed that the question whether fraud has or has not been committed in presenting or prosecuting a demand or claim before a tribunal having authority to allow or disallow it is peculiarly judicial in its nature, and that in ascertaining the facts material in such an inquiry no means are so effectual as those employed by or in a court of justice. The Executive branch of the Government recognized the inadequacy for such an investigation of any means it possessed, and declared that Congress by its 'plenary authority' ought not only to decide whether such an investigation should be made but provide an adequate procedure for its conduct and prescribe the consequences to follow therefrom."

While these expressions were all made regarding the investigation of fraud merely, the principles involved are applicable to every situation in which parties contest regarding the facts concerning and the law applicable to any transaction. Therefore, unless the duty to decide such questions is expressly given by statute, and the machinery necessary for the successful dealing with judicial problems created, there can be no question but that judicial controversies in all such matters should, so far as possible, be referred to the courts where there can be a judicial determination of the controverted facts and law. In such a course only, can there be a reasonable certainty that justice will be done. On this point reference may appropriately be made to the opinion of Attorney General Wirt, already quoted above. (1 Op., 631.)

Moreover, in this connection, this further fact should be observed. Experience in the past has shown that persons desiring to share in the award at times manifest a disposition to present their claims to the Department in a loose, inartistic, and prejudiced fashion not calculated to enable the Department to arrive most easily at the exact truth, and the Department is virtually helpless effectively to require other and proper presentation. Again, the Department being a political branch of the government, attempts are oftentimes made to invoke outside influences and to bring to bear political and other pressure against it. Obviously parties in litigation in the courts would never think of using such reprehensible methods upon the court, and if they attempted to do so they could be adequately dealt with, but the very character of the methods and the limitations of the powers possessed by the Department make it impossible for it properly to relieve itself from such attempted interference and coercion. It is most desirable and necessary, as a practical matter, that opportunity for this practice be reduced to the minimum by reference to the courts of all questions not clearly falling within the Secretary's duties, as imposed by statute. That is to say, this emphasizes the need and value of curtailing rather than extending the jurisdiction of the Department by implication.

It is also to be borne in mind that the statute makes and constitutes the Secretary of State a special tribunal with limited powers and jurisdiction, and it is fundamental to our jurisprudence that a special tribunal must keep carefully and strictly within the limits of its powers and duties.

Moreover, it is to be observed that Congress would in wisdom naturally lodge in the Secretary of State the authority to carry out that part of the municipal function which he can perform better than any other tribunal, namely, determine the parties having the primordial right. Superior efficiency in this respect results from the fact that the Secretary has all the information possessed by the government regarding the initial injury and the sufferers therefrom; much of such information may be in official correspondence, which, because of its confidential character, may not be made public and to which, therefore, the courts could not have access; and, finally, he has at his command, as the courts have not, the machinery necessary to secure additional information on this point if such information be required. In view of these considerations, the conclusion is necessary that Congress, in putting upon the executive a part of the burden under municipal law, intended that it should be that

part, and that part only, which the executive was best fitted to perform. Therefore, the statute should be taken strictly and literally, and the jurisdiction it confers should be confined within those limits which the Secretary of State can administer better than anyone else, and which, moreover, is the full jurisdiction he can effectively administer.

Finally, the statute provides that the Secretary of State "shall determine the amounts due claimants, respectively"; shall "certify the same to the Secretary of the Treasury"; and that the latter "shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due * * * to the ascertained beneficiaries thereof of the certificates herein provided for". It will be observed that under the statute there is no provision whatever for an appeal from the Secretary's decision, or for a review of his findings. The money is appropriated to pay "to the ascertained beneficiaries thereof of the certificates" issued by the Secretary of State. It must, therefore, be that the Secretary's findings and determinations, when made and certified to the Treasury, are final and conclusive, and can not be reopened, modified, or set aside, either directly or collaterally, in any proceeding in a court. As the court said in *Alling v. United States* (*supra*) regarding an analogous but much narrower statute authorizing the Secretary to "distribute the moneys so received * * * and to pay the same * * * to the parties respectively entitled thereto", "*the Secretary of State is by law authorized and directed to do all that can be done for claimants, without further legislation*". Considering the deficiencies inherent in the executive in the matter of judicial machinery and therefore in the determination of judicial controversies; that contests regarding derivative rights are all of necessity of a strictly judicial and not infrequently most involved character; and that there is no provision for appeal from the Secretary's decision, which is final on the matters covered, there appear the very strongest practical reasons for the Secretary to restrict his jurisdiction carefully not only within the limits laid down by the statute, but within the bounds over which he can exercise effective jurisdiction and determination.

This principle obviously leaves open for adjudication in the courts all questions not determined by the Secretary; and, therefore, all persons holding derivative rights may resort to the courts for the enforcement thereof, since the Secretary would have made no determination concerning such rights.

In conclusion upon this point, it is submitted that, having in mind

the precise meaning which has been given to the word "claimant" both in diplomacy and in the courts when dealing with international awards; that the executive is not prepared effectively to exercise general judicial functions; that from the exercise of such functions as the Secretary of State is authorized to perform under the statute there is no appeal provided and, therefore, that the Secretary's action must be final on the matters determined by him; that being constituted a tribunal of limited jurisdiction, the functions thereof must be exercised strictly within the limits laid down; and that finally, and in the absence of some express statement to the contrary, it must be assumed that Congress intended that the executive branch should exercise those functions for which it is best fitted to perform and none others — the jurisdiction conferred on the Secretary of State by the statute in question should be regarded, interpreted, and enforced as extending merely to the determination of the initial or primordial rights, leaving to the ordinary courts of justice the function of passing upon the complicated questions of law and fact which must of necessity arise in connection with the determination of all secondary or derivative rights.

Parties appearing before the Department with secondary or derivative rights not infrequently assert that they have a lien upon the funds in the hands of the Department by virtue of certain relationships which they hold or have held to the primary claimants, or by virtue of the instruments of various kinds which they hold, and they, therefore, contend that the Department must consider and pass upon their claims and make them participants in the Department's distribution of the funds. It is believed to be unnecessary, regarding this contention, to enter into any extended argument or to do more than point out that if, as the courts have repeatedly held, the primordial claimant has no strict legal or equitable right, title, or interest in the fund then *a fortiori* those holding merely derivative rights from such persons could have no lien upon the fund so long as it is in the hands of the national government and before it reaches the hands of the primordial claimants under and pursuant to the determinations made by the Secretary; and that the question as to what, if any, rights such parties may have in the fund after it reaches the hands of the initial claimants, this Department is not, under the view herein taken, authorized to consider, pass upon, or determine. All such persons have complete opportunity to invoke their full, legal, and equitable remedies in the courts as to those against whom they assert rights, and to the courts, if they are so advised, they should resort.

Should any object to this on the ground that the rights or equities they consider themselves possessed of are not cognizable either at law or equity, it should be said in reply that it seems perfectly clear they do not, in such event, possess rights which should be recognized by the Department.

The Department has in the past, and it is recommended that this procedure be continued in the future, issued certificates, as a matter of grace and accommodation, to persons holding assignments, orders for payment, powers of attorney, or other instrument, such funds or parts of funds as any claimant should, in such instruments, direct to be paid and should indicate a willingness to have so paid; but it is also recommended that whenever payment under any such assignment, order, power of attorney, or other instrument is contested, that then the matter should proceed in the regular course recognized by statute, the certificates being issued to the original claimant and the other party being left to his remedy in the courts. In no other way can it be certain that impartial justice will be done.

It is, therefore, recommended that in this case the Secretary issue his certificates to the Treasury for and in behalf only of those who are found to possess initial or primary rights in the award; that he remit those who claim secondary or derivative rights to their remedies in the courts, save in those cases in which such persons appear with uncontested orders or assignments; and that, inasmuch as there are a number of parties claiming secondary or derivative interests in this (the Alsop) award, in all those cases, if any, in which the original claimant is not now living the certificates be issued for such claimant's share to a bonded administrator or executor, and to no other person, in order that the rights of those claiming derivative interests may be amply protected.

It has been argued in connection with this case (see brief filed in support of the contention that the Secretary of State should adjudicate and pay from the award certain claims for compensation for services rendered by persons said to be "liquidators" of Alsop & Company) that the purpose of the statute was to constitute the Secretary of State a "special equity judge" and to vest in "the Secretary of State, as a special equity judge, complete jurisdiction to hear and adjudicate all questions as to the ownership of the fund"; that the Secretary of State has, "*as a special equity judge*, the same jurisdiction to administer and distribute a trust fund that all other equity judges have under like circumstances"; and, seemingly, that the Secretary "shall hear and

determine all the equities between the parties, and make a complete distribution of the fund by a final decree".

It is believed that these contentions are sufficiently met by the discussion which has preceded. It may, however, be added that the statute certainly does not in terms confer or purport to confer any such powers and duties as are here contended for, and practical considerations already mentioned render any such extensive interpretation by implying such powers or duties most undesirable, even if such extensive interpretation had, as it is believed it has not, any legal basis.

It may, moreover, be added that the Department has not so interpreted the meaning and purpose of the statute. (See brief in *Pell v. Hay*, prepared and filed in that case by Solicitor Penfield.)

Finally, the matter of the purpose of the statute and the powers thereby conferred would seem to be conclusively settled (and in a way to negative the contentions set forth above) by the statement made at the time the matter was reported by Mr. Hitt to the House from the committee (the provision being incorporated in the Diplomatic and Consular Appropriation Bill). Mr. Hitt said:

"These are the changes in this appropriation bill, as compared with that of last year. There is a single item which touches more general legislation. The trust funds in the custody of the State Department have heretofore, by the officer having them in charge, been deposited where he pleased, deposited generally in banks. The Secretary of State has suggested, and the Committee on Expenditures in the State Department of the House of Representatives have presented to the Committee on Foreign Affairs, the draft of an amendment to the existing law. By it we have provided that these funds shall be deposited and covered into the Treasury and paid out on certificates of the Secretary of State; a reform which I think will meet the approval of every member of the House."

BOOK REVIEWS

Juris et Judicij Fecialis, sive, Juris Inter Gentes, et Questionum de Eodem Explicatio. (An Exposition of Fecial Law and Procedure, or of Law between Nations, and Questions concerning the same.) By Richard Zouche, D. C. L. Edited by Thomas Erskine Holland. Vol. I. A Reproduction of the First Edition (1650) with Introduction, List of Errata, and Table of Authors. Vol. II. A Translation by J. L. Brierly, M. A., B. C. L. Washington: Carnegie Institution. 1911. pp. xxxii, 204 and xviii, 186.

These beautiful volumes constitute the first instalment of a series entitled "The Classics of International Law," under the general editorship of James Brown Scott, member of the Institute of International Law. In his letter to the President of the Carnegie Institution, dated November 2, 1906, Mr. Scott submitted the following proposal: "That the Carnegie Institution undertake the republication of the various classics of international law; that the texts be edited in the original without note or annotation; that suitable introductions be contributed to each text by specialists of standing; that the texts be accompanied by translations when the originals are in foreign languages; that the individual texts selected for publication be edited by specialists in international law; and that the series as a whole be under the supervision of an editor-in-chief."

At a banquet of the American Society of International Law, held on April 24, 1909, Dr. R. S. Woodward, President of the Carnegie Institution, announced the republication by the Institution of the recognized classics of international law. "Dr. Woodward explained that the original texts were to be reproduced by the photographic process, thus avoiding any corruption of the text, that the text would thus be presented to the modern reader exactly as left by the learned author, that the notes, annotations, or variants, comprising an *apparatus criticus*, would form an appendix to the text, and that each work selected for republication would be accompanied by an English translation in a separate volume". (See this JOURNAL, 3:701.)

This *modus operandi* has been criticised by the famous Belgian publicist Nys (see *Revue de droit international et de législation comparée*, second series, Vol. II, pp. 484-485), who objected both to photographic reproductions of the texts and to the English translations accompanying them. (For a reply by the Editor-in-Chief to these criticisms, see this JOURNAL, 4:168-169).

The reviewer does not share in the distrust of translators voiced by Professor Nys, provided they are selected. On the contrary, the translation of the "classics" into a modern language seems to be one of the most valuable features of the project. Where one reader will consult the original text with pain and difficulty, many will read a good translation with profit and pleasure. Not being an expert Latinist, the reviewer is unable to judge of the accuracy of Mr. Brierly's translation; but he has confidence in the judgment of those entrusted with the selection of competent editors and translators. The student is not left at the mercy of any one who may have a mistaken notion of his competency as a translator or who may wish to review his Latin by translating a so-called classic. In any case, the confirmed Latinist now has access to the original text of such an important work as Zouche's—an advantage which he had hitherto seldom enjoyed.

It would appear, however, that Professor Nys' objection to photographic reproduction is better founded than his objection to translation. True it is that the text is accompanied by a list of *errata*, but it is awkward to be compelled to compare every doubtful passage with such a list printed at the end of the volume. For the sake of convenience the *errata* should be found on each page on which they occur. It would also be desirable to have the original text and its translation printed on parallel pages in the same volume.

Concerning the propriety of including Zouche's work in a series of "Classics on International Law," there can be no question. Zouche cannot be claimed as a real *authority*, even for his own time, since he is more apt to cite the opinions of others than to express his own views. But he abounds in historical instances, he is always interesting, and, as the author of the first *manual* on international law, his influence in England was formerly very great. The modern reader will be particularly interested in Zouche's discussion of Peace and Arbitration (II, pp. 57-59). Professor Holland's scholarly Introduction is beyond praise.

AMOS S. HERSHHEY.

Die Hauptfragen des internationalen Privatrechts. By Dr. F. Meili. Lectures delivered before the Association of Cologne for the Study of Law and Political Science. Breslau: J. U. Kern. 1910. pp. 58.

In the first part of these lectures the author deals briefly with the nature of the subject, its history, and the sources of the present law. In part two he discusses some important topics in the conflict of laws, including those of nationality and domicile, *renvoi*, the formal requirements and the interpretation of legal acts. In part three he gives the principles applicable to the law of persons, to the law of family, to the law of property, to the law of obligations, to the law of succession, and to the law of bankruptcy. In part four he deals with the *international* regulation of certain matters in the conflict of laws.

As a brief survey of the fundamental questions underlying this important subject, Professor Meili's lectures are excellent. They are written in a simple style, and, notwithstanding their small compass, are comprehensive in their treatment. Attention is called, among other things, to the work of the Institute of International Law with reference to this subject and to that of the Conferences of The Hague. The book may be heartily recommended as the first reading in the conflict of laws. For a more detailed statement of the law and of the author's personal views, the larger works of this eminent jurist should be consulted.

ERNEST G. LORENZEN.

The Relations of the United States and Spain: The Spanish-American War. By French Ensor Chadwick, Rear Admiral, U. S. Navy (Retired). New York: Charles Scribner's Sons. 1911. 2 vols. pp. vii, 514 and xii, 414, maps.

Quoting the words of the author: "This work is intended in the main as a documentary history" of the Spanish-American War. This certainly does not offer an alluring prospect to the general reader. Usually to others than the students of the special subjects to which they relate, official documents are of little interest, and at best are apt to be dry reading; nevertheless the reader who, taking too literally the author's announced intention, turns aside from these volumes, will miss much.

Admiral Chadwick's familiarity with the events of which he treats, due in part to his having been chief-of-staff to Admiral Sampson throughout the war, has enabled him to select from the abundance of material available, documents, the greater part of them interesting in themselves, which under his skillful grouping present a clear-cut picture of the course

of events. About the chosen documents the Admiral has woven a temperate and impartial narrative which, while it neither emphasizes nor disguises the opinions of its author, points the non-military reader to a better understanding of the events themselves, and of their relation to each other, at the same time leaving him to form his own conclusions from the matter presented. The result is a work of positive value, which seems destined to hold a permanent place in the literature of the Spanish-American War.

After a preliminary review of the naval movements in preparation for the war, an analysis of the forces both Spanish and American, a consideration of the strategy of the campaign, and an instructive chapter on "Spanish Views", volume one is devoted to the operations from the beginning of hostilities up to the army expedition to Santiago, the most important of which are, the blockade of Havana and the western part of Cuba, the naval battle of Manila Bay, the moves to intercept Cervera's fleet, and the final location and blockade of that fleet in the harbor of Santiago.

Volume two begins with the army expedition to Santiago and ends with the treaty of peace concluded at Paris, December 10, 1898; the important intermediate events being, the joint army and navy operations which resulted in the capture of Santiago, Manila, and the island of Puerto Rico, the movements of the Spanish fleet under Admiral Camara towards the Philippines, and the proposed counter movement of the Eastern squadron, under Commodore Watson; rendered unnecessary by Camara's return to the coast of Spain.

The volumes contain many maps, a valuable bibliography, and are amply indexed.

The descriptions of the battles of Manila Bay, May 1, El Caney and San Juan Hill, July 1, Santiago, July 3; battles of which the author says, "May 1, July 1, and July 3, in 1898, are dates which both nations may well hold in lasting and proud remembrance," probably will appeal most to the general reader. But to the writer it seems, that other portions of the work, though less gratifying to our national pride, possess a more lasting value, if we, as a nation, have the wisdom to heed the lessons to be found therein.

No thoughtful reader can question the author's statement that "neither Spain nor the United States had a fleet fitted, as far as material strength was concerned, to meet that of even a second class naval Power," and it may be said with equal truth that neither nation had

any well matured plans for either offence or defence. Admiral Cervera's correspondence, characterized by the author as "pathetic in the light of later events," makes it manifest that both statements were true as regards Spain, and the whole narrative abounds with evidence to the same effect as regards the United States. Fortunately for us, the deficiencies of the United States were by no means so great as were those of Spain.

As illustrations of the lack of naval strength on the part of the United States may be cited: the frequent withdrawal of vessels from the blockade of Havana and the west of Cuba for more pressing duties elsewhere, often necessary to an extent that impaired the efficiency of the blockade, the impossibility of reinforcing Dewey in the Philippines without robbing the North Atlantic of much needed capital ships, and the lack of suitable scouting vessels for use in the moves looking to the location and interception of Cervera's fleet. As to absence of plans, no better illustration is needed than the want of correlation between the army and the navy, only too evident in the joint operations at Santiago, of which the author says, "But this arose, not from want of good will, of which there was plenty, but from want of any general staff system in both the war and navy departments, which prevented that intimate understanding and mutual study of conditions as they arose; . . ." Reflection on what might have been the consequences had the condition of our adversary been different is painful.

On the walls of the armories of the Republic of Venice was inscribed the following: "Happy is the nation that in time of peace prepares for war." Time with its ever increasing resort to pacific methods for settlement of international disputes, has neither subtracted from the truth of these words, nor made it less the part of wisdom for a nation to adopt and adhere to a consistent policy for the national defence. The gratifying increase of the navy since the Spanish-American War, the establishment of the General Staff for the Army, the organization of the General Board for the Navy, and of the Joint Army and Navy Board, show that the United States has not been unmindful of the lessons taught by the conflict with Spain; but recent Congressional action impels one to ask, is not more required *lest we forget*; would not the establishment of a Council of National Defence, on the lines recommended in the annual reports of both the Secretary of the Navy and the Secretary of War, be a step in the right direction?

Throughout the two volumes, notably in the discussion of the naval

battle off Santiago, Admiral Chadwick has adhered to his conception of history, "to hold back no syllable of the truth, neither to magnify our own exploits nor deprecate those of the foe", and in so doing has built up, not unconsciously perhaps, a just tribute to the officer to whose memory the volumes are dedicated; an officer who by reason of his abilities, and his achievements in the face of almost overwhelming difficulties, merits a high place in America's list of naval commanders.

JOHN P. MERRELL.

Les Grands Traitées politiques. Recueil des principaux textes diplomatiques depuis 1815—jusqu'à nos jours avec des commentaires et des notes. By Pierre Albin. Paris: Félix Alcan. 1911. pp. xii, 570.

This is a very useful volume. Though much less complete and comprehensive and therefore less attractive to students of international law than Dr. Strupp's *Urkunden zur Geschichte des Völkerrechts*, it will perhaps be found more serviceable for diplomatists, journalists, and men of affairs.

In the *avvertissement*, the author thus states his purpose:

We have tried to collect and to classify methodically in the smallest possible volume the greatest possible number of treaties of a political nature concluded since the Treaty of Vienna. . . . We have put aside all treaties, conventions, or arrangements having a commercial, judicial, or administrative character.

The six books (*livres*) into which the work is divided deal respectively with Western and Central Europe, Eastern Europe, Africa, Asia, America and Oceania, and International Arbitration. Each of these books is divided into sections, mainly on a geographical basis; thus, Book I falls into parts dealing separately with Belgium, Luxemburg, the German Empire, the Kingdom of Italy, Italy and the Holy See, Norway, and Special Agreements. For example, the section on the German Empire contains the Treaty of Vienna (1864) relating to the occupation of the duchies Schleswig and Holstein; the Treaty of Prague (1866); the Preliminaries of Versailles and the Treaty of Frankfort (1871); and the Treaty of Vienna (1879) relating to the origin of the Triple Alliance.

It will be seen that the selections are made from a political or diplomatic rather than an international law or historical point of view. Many important treaties and documents are necessarily omitted. One interested in the Monroe Doctrine will hardly feel content with that portion of the text of President Monroe's message relating to this sub-

ject and the selections from the Clayton-Bulwer and Hay-Pauncefote Treaties cited in the note on pp. 512-513. The student of the history of the United States may be gratified to find the text of the Treaty of Paris (1898) with Spain: but he will be disappointed to discover in the section on American rivers the treaties relating to the navigation of the Parana and the Uruguay instead of those dealing with the Mississippi and the St. Lawrence.

It is, however, a matter of no small convenience for the student even of international law to have in a place readily accessible the important treaties relating to such countries as China, Morocco, and Thibet.

The book is well-furnished with alphabetical, chronological, and analytic tables. It contains nearly one hundred treaties accompanied by useful historical notices and commentaries.

AMOS S. HERSEY.

A Short History of War and Peace. By G. H. Perris. New York: Henry Holt & Co. London: Williams and Norgate. 1911. pp. 256.

It will be noticed that, in the title of this book, "war" precedes "peace". War to bring about peace seems paradoxical. Yet it seems undoubtedly to be true, as the author says, that war is often a process of evolution — an explosive process which occurs when the progressive movement of the human molecules towards a reorganization making for equality of opportunity and a betterment of the law, is unduly held back by the forces of standpat-ism and vested interests. Mr. Perris traces this process, showing the gradual sweep of the progressive movement over the world accompanied by explosions when the crucible was shut up too tightly. He begins with the dawn of history and comes down to the present time. Even the military emperor of antiquity is seen as a progressive when he rules with an iron hand over the small communities which lie exhausted after centuries of strife and bloodshed. The peace which he compels is fictitious to some extent, but it is better than incessant war. Enforced peace through great areas leads to trade, and trade to money, money to the power of the purse, and the power of the purse to a general extension of the credit system. The military empire under these influences disintegrates into self-governing trading and money-loving states, jealous of each other, warring with each other by commercial prohibitions and regulations, and by armies and navies, and mutually guaranteeing each other so that contracts may be faithfully observed and "credit" kept. The world then comes under the

control of "the credit economy," which in turn leads to the diffusion of knowledge generally and to a new and higher philosophy, organization and law.

Under the system of "the credit economy", peace is sought to be obtained by the application of the principle of "the balance of power." All the states agree that if any one attempts to alter the *status quo*, its surrounding neighbors will throttle it into submission and compel it to observe the *status quo*. This system ultimately leads to a "concert" of the Powers, and this, in turn, in some cases, to federation.

When war is considered in the light of an explosive process in evolution, and when it is considered that all the world is never at the same stage of evolution, and that these processes of organization and reorganization are going on in different stages and at different rates of advance in the different states and nations, the wonder is that wars do not arise oftener, and that we have as much peace as we have without stagnation.

Such books as this of Mr. Perris are helpful to the cause of "peace as a practical proposition." If wars are only explosions due to confining the mental and spiritual gases too closely, the true way to peace is to provide an improved organism and better machinery and rules for the body-politic, and to equip the machinery with more efficient checks and safety-valves so that these mental and spiritual gases may be dissipated into the air at times when the draught is too great and the fire under the crucible becomes hot. Mr. Perris believes that an "organization of peace" is already beginning to evolve, and is hopeful that by gradual improvements in the existing organization of the world, war may ultimately be abolished. We know that improvements in political and social organization have put an end to men continually fighting with their neighbors; and the conclusion seems inevitable that the only thing which will reduce the area and amount of the destruction done by war, and ultimately perhaps abolish it, is the improvement of the political organization which now exists in a crude and hardly perceptible form, binding together all the peoples and nations of the world in a "solidarity", if not yet in a unity.

Perhaps it is not too much to say that Mr. Perris's book is a treatise in political science. The same historical and scientific method of study is applied to the whole of human society as is applied by political scientists to the study of the town, the city, the state, or the nation. Moreover the purpose is the same, — the improvement of the existing organization so as to make it more economical and efficient.

The brevity of the book, its excellent style, the wisdom shown in many of the inferences and conclusions, all commend it as one of the most useful and truly progressive which has recently appeared.

A. H. SNOW.

Traité de Droit Public International. A. Mérignac. Troisième Partie—
Le Droit de la Guerre. Paris: Librairie Générale de Droit et de Jurisprudence. pp. 596.

This, the third volume of A. Mérignac's *Public International Law*, treats in its first part of the common law of war irrespective of the field of operations, following with a discussion of such features as apply particularly to war on land. The work beside illustrating, as might be expected, in many of its phases the ability of its author, is entirely up-to-date, a reasonable degree of attention being devoted to those features of the subject which have developed within a very few years, such as wireless telegraphy and aerial navigation. It embraces everything of value in the production of the author published in 1903, and now out of print, relating to the laws and customs of war upon land according to modern international law and the codification of the Conference of The Hague of 1899, and includes the results of the further codifications of the Conference of 1907. As to the subject of aerial warfare, he notes a natural subdivision between so much of it as pertains to war on land and so much as pertains to war on sea, reserving the latter for discussion in connection with a volume yet to be issued relating to the laws of maritime warfare.

So long as warfare between nations is recognized as legitimate and civilized, it is of course well that its rules should be systematized, and this work is admirably done, from the usual standpoint, by M. Mérignac. His work is a valuable repository and has the advantage of being the most modern upon the subject.

It is the opinion, however, of the present reviewer that the time is fast approaching when there should be logically an entire recasting of the laws of war. If it be admitted, as now is universally done, that the normal and preferable state of nations is one of peace and the abnormal and injurious state is one of war, our treatment of war, through its laws, should bear a rough resemblance to our treatment of disease. This, in the first place, we try to prevent, and if it comes, to minimize its effects, both upon the patient and upon his neighbors. Our laws of

health are prepared by those who are healthy, and desire to remain so, and to fight in every imaginable way against disease. They are not made by or to meet the desires of those who look upon disease as normal and natural and, if not praiseworthy, at least not to be interfered with by the healthy, as it is today by, for instance, quarantining the sufferer.

When, however, the laws of war are being framed, instead of allowing them to be dictated by those whose interests are in peace and the ways of peace and who expect themselves to remain peaceful and desire their neighbors to do the same, we allow them to be dictated by those who expect to go to war and who desire their warlike operations facilitated and legalized even at the expense of other nations, instead of proscribed and confined.

If the laws of war were framed by those who desired to preserve peace and to make war objectionable to those who engaged in it, instead of being framed from the reverse point of view, several things occur to the present writer as likely to take place among many other reforms which undoubtedly would follow. For instance: If war is to be treated as an evil, as it is, the international laws of war and national laws as well, should prohibit, under the severest possible penalties, the sale of arms or ammunition to any nation at war or which may be reasonably expected soon to take up arms. If our laws, international and national, were further civilized from the same point of view, smug financiers in European capitals would not furnish money to enable wars to be carried on, as they have been doing even within the past few months.

Rewriting the laws of war from the standpoint of health rather than of disease, neutral nations will not permit themselves to be interfered with in conducting the orderly operations of commerce because two nations, crazed with the war spirit, are at each other's throats. Such neutral nations would say that there was no foundation in justice for the so-called right of blockade and that they had a perfect right to trade with whomsoever they might choose, without being halted, directed and controlled by a bad-tempered or covetous combatant. It remains true, however, that it might also be well to consider the boycott of fighting nations by refusing all commercial intercourse with them till war ceases, thus pursuing the analogy afforded by imprisonment of civil offenders till they have had time to repent of their misdeeds.

Again, such neutral nations might well insist that they and their citizens should not be made the sufferers, as they are today, under the common law of war, from what are called the accidents of war. If a

man, crazed with anger, striving to kill his enemy, shoots a gun at him, killing a by-stander, he is not acquitted of responsibility either civil or criminal. There is no more reason in justice why, if a nation, filled with fury against its neighbor, bombards that neighbor's cities, it should not be held responsible for the damage inflicted by its misdirected shots striking the property of neutrals. If nations propose to dance to the strange tune of war, they should be prepared to pay the piper and should not be permitted to lay down rules absolving them from any such responsibility.

The ideas above expressed may seem so fanciful at first glance, because unaccustomed, as to have about them an air of unsoundness, but the writer believes this erroneous. They merely suggest the logical application to the laws of war of those principles of order and decency which we apply in our daily life as between man and man, and the reason is by no means apparent why one man should be obligated to treat his neighbor with courtesy and respect and a million men should find themselves at perfect liberty to set aside all laws of decency. There seems at least to be no reason why we should not speedily surrender our ancient, barbaric and illogical point of view for one which will be truly modern, civilized and logical.

The man who will consider in all its ramifications the rewriting of the laws of war from the standpoint of international health and justice, abandoning the standpoint of international disease and consecrated injustice, will work to bring about an ultimate revolution in our international affairs by no means inferior to that accomplished by Grotius and more lasting, because he will base his reasoning upon immutable principles of right. He will at the same time, his ideas once accepted, do more to establish the cause of peace than existing activities have been able to accomplish, and this simply through applying to nations acting in their national capacities the inexorable logic we apply to individuals acting in their private capacities.

The work of M. Mérignac has not done this, but we may not criticise him therefor, since no predecessor has done it. Within the limitations under which he has written, his work is well done, but the future, if we are to progress, must show a greater work upon the laws of war, which I believe will be of the character I have endeavored to indicate.

JACKSON H. RALSTON.

Staatliches deutsches International-privatrecht und völkerrechtliches International-privatrecht der Haagerverträge. By Wilhelm Kaufmann. Breslau: M. & H. Marcus. 1910. pp. 59.

In this pamphlet — a reprint of a portion of a jubilee number dedicated by members of the law faculty of the University of Berlin to Professor Otto Gierke on the occasion of the 50th anniversary of his *Promovierung* as doctor — Professor Kaufmann undertakes a study of the nature of the rules of private international law sanctioned by the German legislator and of those adopted by the convention of The Hague. The author shows the fundamental differences existing in many respects between the aims, scope, and application of the rules prescribed by a particular sovereign Power for the solution of the conflict of laws and those resulting from international agreement between a number of states. He points out the defects which in the very nature of things, attach to the regulation of the conflict of laws by a single state, and the advantages resulting from international agreement. Special consideration is given to *renvoi*, to public policy, and to other questions demanding different solutions according to the nature of the system (whether national or international) of which they form a part.

ERNEST G. LORENZEN.

Le Droit des Gens en Marche vers la Paix et la Guerre de Tripoli. By Jonkheer J. C. C. Den Beer Poortgael. The Hague: Martinus Nijhoff. 1912. vii, 133 pages.

This book is the outgrowth of an effort made by the author in 1911 to coöperate with the Carnegie Peace Endowment, Division of International Law, in its work of promoting the development of the law of nations and the substitution of a judicial system for war in the settlement of controversies. A memorandum sent in the autumn of 1911 to Dr. James Brown Scott, who had invited his coöperation, constitutes the basis of this work, though this memorandum has been revised, much enlarged and brought up to date.

General Den Beer Poortgael, the author, was, before his death recently, one of the most eminent authorities of Western Europe on international law. He represented The Netherlands in both the Hague Conferences, where he took advanced ground in favor of limitation of armaments and the substitution of a general judicial system for war in dealing with international differences.

In the opening of his work he takes a rather pessimistic view of the

general political situation at the time when it was written, in 1911. Insurrections in Mexico, in South and Central America, and in China, and the troubles in Northern Africa, etc., led him to feel that we are not very far advanced in the domain of law (*droit*) in international affairs, notwithstanding the two peace conferences at The Hague. As the general political situation of the world has not improved but in some respects grown worse since his volume was written two years ago, his treatment of his subject is peculiarly appropriate to our time.

In his rapid historical sketch of the character of wars, their calamities, disasters, cruelties and injustices, he reminds one of the earlier pacifists — Worcester, Dodge, Channing, and Ladd — in his conception of the moral baseness of the system of brute force. He does not believe that war will disappear from the world at one blow. But he holds that it is not an inevitable expression of human nature and society, as some have held, and that it will certainly gradually decline with the progress of the true principles of civilization.

He pens a very severe word of condemnation for spying in time of peace, as well as for the shocking cruelties of both the Italian and the Turkish soldiers in the Tripolitan war, of which he gives examples. He admits the great difficulty of applying the accepted laws of war in a conflict with uncivilized peoples. But the fact that such peoples do not observe these laws does not excuse a civilized Power from respecting and keeping them in a war with the uncivilized.

In his chapter on Italy's declaration of war against Turkey, he examines the grievances, which were brought forward by the Italian Government to justify its course, and finds that these furnish not even a plausible excuse for the declaration in the manner in which it was made. Italy proceeded on the theory that "might makes right." The declaration was in violation of the Hague Conventions of 1899 and 1907. It was likewise in violation of Article VII of the Treaty of Paris of 1856, which pledged the signatories to respect the territorial integrity of the Ottoman Empire. It was furthermore in violation of Article VIII of the same treaty, which stipulates that before going to war a nation shall notify the other signatory Powers and give time for mediation. Italy acted as if this treaty had no existence. Treaties, the author holds, are inviolable, and no one nation party to a treaty has the right to free itself from its obligations without the consent of the other contracting party. Italy's pretended right to Tripoli because the Romans once occupied the country, or because of its geographical situation, or be-

cause of the action of the other Powers in seizing portions of Northern Africa, the author meets with scarcely suppressed ridicule. He cites the utterances of prominent men and journals in other countries, and the numerously signed Juridical Protest of eminent Englishmen in support of his claim that the general public opinion of the civilized world condemned the conduct of Italy.

In his chapter on "The Remedies" for war, the author deals in a trenchant way with the influence of the chauvinistic press, which he considers to be very often, if not generally, in our day the "deadly influence" which engenders war. He cites examples from the English papers before the outbreak of the Boer War, and from the Italian journals which did so much to bring on the war in Tripoli. This class of journals must, he says, be combatted with the same arms, that is, with other papers. He lays great stress on the education of the young, who must be taught that there is not one morality for individuals and another for states. "There are not two kinds of morality, one for individuals and another for peoples, one for the poor and another for the rich, one for the small and another for the great of the earth. Evil remains evil everywhere and for all. The commands which God has given and placed in the conscience of men and which Moses engraved on tables of stone on Mount Sinai must regulate the conduct of the entire world without any exception." The children at home and in the schools must be "penetrated" with this universal morality. Among the fruitful sources of war he places "secret treaties," which have done such enormous mischief among the modern European nations. This abuse of treaties, which are "the corner-stone of international law," must be wholly abandoned. In his treatment of the great armaments of the day, as a ruinous charge on the people and as provocative of suspicion and jealousy, which are liable to provoke war through their employment to promote economic expansion, he leaves nothing to be said. He urges the freest intercourse among peoples in education, travel, trade, etc. "Everybody for everybody" should be the slogan.

The whole chapter on the remedies for war, including the section on obligatory arbitration, is of a very high order, and has rarely, if ever, been surpassed in its insight both moral and political. He makes a fine discrimination between real and spurious national honor and quotes approvingly President Taft's famous utterance in New York on March 22, 1910, in favor of arbitration even of questions of honor and vital interest.

After discussing the question of an "International Armed Force" to serve simply and purely as a police power, of which he approves, he has a "Last Word" on the general situation of the day, the rivalry in armaments, the prodigious burdens laid by them on the peoples, the ruin which awaits the nations at the end of the race, if the whole course of things is not changed. He continues: "There remains indeed much to be done to facilitate the march of the law of nations towards peace." But though the way may be long and the obstacles many, the end, he believes, will at last be attained if we continue our course courageously under the guidance of the "Shining Star of Truth."

There are two brief annexes to the work, one giving the text of the Juridical Protest, already mentioned, against the war in Tripoli, and the other the brief speech made by the author before the First Commission of the Hague Conference of 1899.

The high character of the work is sustained from the beginning to the end, and it is an unusually important contribution to the study of the manner in which international law may be made to promote the coming of the era of good-will, justice and peace.

BENJAMIN F. TRUEBLOOD.

La Neutralizzazione. By Dr. Aldo Baldassarri. Rome: Topografia Fratelli Pallotta. 1912. pp. viii, 165.

This little treatise is devoted to the study of the relations created between states by neutralization, using the word in its more restricted sense as applied to the deliberate neutralization by treaty in permanence, or for an unlimited term, of a state or part of a state. The somewhat closely related case of neutralization of national or international organizations, such as the hospital service in case of war, is merely glanced at, and the greater part of the work is given to an historical analysis of the several treaties upon which the principal cases of territorial neutralization are based.

The author justifies his enterprise by pointing out that the subject has hitherto been treated somewhat as a curiosity of international law, and that it has not in fact even yet found a settled and systematic place of its own in works devoted to that science.

The truth is that the examples of neutralization are as yet of very limited number, so limited that it is not altogether easy to infer principles of general application from the details of treatment arising out of special circumstances. It is in fact a comparatively new device tend-

ing to remove certain incitements to war or to reduce in some degree the destructive effects of war, should it break out. It has already proved its value as an immediate solution of pressing and dangerous questions, and it is no depreciation to say that the ultimate strength of this kind of fireproof construction in case of a general conflagration is as yet unascertained.

A contract in the form of a treaty is at the foundation of every case of neutralization: we must then examine the obligations assumed by each of the parties, that is, on the one hand, the neutralized state, and on the other, the neutralizing states. The cases of Switzerland and Belgium afford the standards for comparison, and, indeed, it is not unlikely that the entire idea is in its main features a result of the historical position of Switzerland in Europe. For centuries previous to 1815, the Confederation of Cantons had held its independence, had made a definite policy of neutrality in all European wars, and had by its geographical conditions been enabled on the whole to maintain this position. At the Congress of Vienna, the Powers recognized this attitude, assented to it, and, admitting it to be for the advantage of all concerned, practically became joint guarantors of the continuance of the *status quo*.

What then are the obligations of the neutralized state? First, no doubt, abstention from war against the neutralizing states, the other parties to the contract; but the case of Switzerland, Dr. Baldassarri thinks, makes it very evident that more than this is inherent in the very idea of neutralization; what was understood and secured in that case at least was adherence in the future to the traditional attitude of the Confederation of neutrality in all European wars. The obligation to abstain from war necessarily infers abstention from all offensive alliances; on the doubtful point of the right to enter into *defensive* alliances, the author decides in favor of the right, always assuming that the obligation undertaken by the neutralized state does not infer warlike measures on its part.

The obligations assumed by the neutralizing towards the neutralized state can be readily summed up in the one duty of absolute respect for the rights and integrity of the latter as it now exists. This obligation is also a mutual one as between the several neutralizing states themselves. Thus a violation of neutrality on the part of one state is not only a wrong done to the neutralized state, but an injury to all the others which joined in the act of neutralization. Whether such a viola-

tion must necessarily as a duty be resented depends on whether an actual guaranty was given or whether the neutralization was merely assented to.

The neutralization of parts of states as, for example, of the Suez Canal, presents special problems, depending on the circumstances of each case, and this is even more the fact when we come to deal with what Dr. Baldassarri calls imperfect neutralizations, the special examples selected by him being the treaties between Buenos-Ayres and Chili as to the Straits of Magellan, and the case of the Panama Canal Zone. These neutralizations are described as imperfect for the reason that they arise out of a treaty intervening between two nations mainly concerned, but inasmuch as other nations which may eventually be more or less directly concerned have not adhered or assented to the terms of neutralization, an anomalous situation might under some circumstances present itself in which the obligation assumed by one of the treaty parties would be inconsistent with the ordinary obligations of a neutral.

Thus, according to the author's reading of the Hay-Pauncefote Treaty, in the event of a war between Great Britain and Japan, while Great Britain, as one of the parties to the treaty, could have no ground for objection to the use of the Canal by the warships of Japan, the latter would under the ordinary rules of international law be in a position to call the United States to account for failure in the duties of a neutral in permitting British warships to pass through the Canal. In this view, it is only in case the other Powers which have any practical concern in the matter should assent to the treaty that the neutralization could be considered perfect.

It may perhaps be questioned whether the distinction between the so-called perfect and imperfect neutralization is of very great importance. If it has any real basis, it lies mainly in the introduction into the treaty of an element somewhat in derogation of the ordinary rule of international law and therefore requiring assent by the other parties before it can be considered as binding on them. As a matter of fact, every case of neutralization has its own peculiar stipulations and conditions and it may perhaps be most usefully regarded as a new and as yet only partially tried device for the solution of knotty problems, the full possibilities of which will be proved only by experiment. As yet, it can be best illustrated by the historical method to which Dr. Baldassarri has in the present case for the most part adhered.

JAMES BARCLAY.

Das Wesen des Völkerrechts und die clausula rebus sic stantibus. By Dr. Jur. Erich Kaufmann. Tübingen: J. C. B. Mohr (Paul Siebeck), 1911. pp. xii, 321.

This little monograph is divided into an introductory and four additional chapters. In his preface the author observes that there are two modes of dealing with the problem of the clause *rebus sic stantibus* usually held to be implied in treaties — the doctrinal-historical and systematic methods. He has chosen to adopt the latter mode of treatment.

In his second chapter the author does, however, present us with some "Historical Evidences." In this connection he discusses the limitations imposed by the Paris Treaty of 1856 upon Russia on the Black Sea, the repudiation of the free status of the harbor of Batum through the Russian Ukase of 1886, the renunciation of the London Protocol of 1852 by Prussia and Austria, and the annexation of Bosnia and Herzegovina in 1908–09. But we need a much more impartial and comprehensive study of historical instances than is furnished in this chapter.

The third chapter (pp. 45–56) is devoted to a refutation of the theory of Dr. Jur. Bruno Schmidt, whose important monograph *Über die völkerrechtliche clausula rebus sic stantibus* was published in 1907. Dr. Schmidt indeed admitted that the doctrine of *rebus sic stantibus* has played a certain part in the practical international life of states, but denied to it a positive sanction in international law. In other words, Schmidt held to the doctrine of *pacta servanda sunt* as the positive rule or principle of international law, though he appears to admit exceptions in practice. This controversy is conducted on both sides mainly on theoretical premises and seems to lead to barren results.

In the remaining chapters, Dr. Kaufmann attempts to establish his thesis on highly abstract and theoretical grounds, based partly on analogies in private law and so-called doctrines of political theory or philosophy. For example, he discusses such problems as the "succession" theory, the concept of the individual, the "Voraussetzung," the concept of law, etc., etc.

We confess to very little interest in these matters, at least in this connection. What we should like to see is a real investigation of historical precedents and their criticism in the light of the international welfare and of admitted principles of law and equity. This is a subject of vital importance, especially in view of the happy progress which is being made in the direction of the judicial settlement of international disputes.

As an example of irrelevancy and of that belatedness which appears

still to be characteristic of some German publicists, we cite the following passage from p. 146:

"Not the 'association of men of free will,' but triumphant war is the social ideal:—triumphant war as the final means to every highest aim. In war the State reveals itself in its real essence; war is the State's highest achievement; in war the State attains its fullest development."

AMOS S. HERSHAY.

International Law. By L. Oppenheim. Vol. II, War and Neutrality. 2nd ed. New York: Longmans, Green and Company. 1912. pp. xxxvi, 711.

The second edition of Professor Oppenheim's well known work has already received a cordial welcome at the hands of those who have appreciated his thoughtful and scholarly treatise from the time of its first appearance in 1905-1906. In the preface to the revised edition of this second volume the author calls attention to the fact that a number of new topics have been discussed, notably the questions whether enemy subjects have *persona standi in judicio*, and whether trading with enemy subjects is permitted. Several chapters of the earlier edition had to be entirely rewritten, owing to radical changes introduced into some branches of international law since 1906.

The chief merit of the present volume is the singular skill with which the author presents the results of the Second Hague Conference and of the Declaration of London. His remarks on the proper method of handling the agreements reached at those two Conferences are very judicious, and it would be well if they could be kept in mind by writers who are inclined to treat those agreements as settled law. They have not yet been generally ratified, and in consequence, says Professor Oppenheim, "the task of the writer of a comprehensive treatise on International Law is very difficult: He must certainly not treat the rules in these unratified documents as law, but, on the other hand, he must not ignore them. For this reason the right method seems to be to give everywhere the law hitherto prevailing, and to give also the changes in the law which are proposed by these unratified documents."

It may be pertinent to ask under what conditions the conventions of the Hague Conferences and the Declaration of London will warrant being considered settled law? Not only will it be necessary that these agreements shall be ratified by the great body of states, and that they shall be ratified without the important reservations which at present

limit the acceptance of them by many states, but also that they shall have been in practice between nations for a shorter or longer period, until they have acquired such force from custom that the right retained by each state to denounce individual conventions of the Hague Conferences, or the Declaration of London as a whole, shall have ceased to have any practical application. So long as a nation has the legal right to refuse to continue to abide by a given rule, it is hardly safe to regard the rule as settled law. It is true that a nation may violate even the long-standing and well-defined rules of customary law; but in such a case the condemnation of the civilized world would operate as a sanction which could not be applied to the exercise of a legal right to withdraw from the practice of a rule of statutory law. It need hardly be observed that in some cases the conventions of the Hague Conferences embody previously existing rules of law which, of course, lose nothing of their force by reason of the fact that nations retain the right to denounce a given convention as a whole. It is to be hoped indeed that not only will nations not avail themselves of their right to denounce a given convention, but that those individual states which have made reservations of important articles of the conventions will in time yield in favor of rules which commend themselves to the great body of nations.

In illustration of Professor Oppenheim's admirable method of discussing disputed questions, we may refer to his treatment of the so-called doctrine of "continuous voyages" (pp. 499-506). The doctrine is first stated as it was held by the British prize courts in such cases as that of the *William* (5 C. Rob. 385) in which the condemned cargo was captured while the vessel was on her way to the enemy port. The later doctrine of the American prize courts is next stated, justifying the condemnation of the cargo when the vessel was captured on her way to the neutral port from which she was later to proceed to the enemy port. The next step was to condemn a cargo captured on its way to a neutral port because it was proved that the cargo, contraband if bound for a hostile destination, was to be transhipped by other hands to an enemy port, as in the cases of the *Springbok* and the *Peterhoff*, arising during the American Civil War. Later British practice during the South African War is next cited, showing the adoption of the American doctrine. After citing the opinions of certain Continental writers on the subject, the author next proceeds to explain the compromise offered in the Declaration of London, which recognized the application of the doc-

trine of continuous voyages with regard to *absolute* contraband and rejected it with regard to *conditional* contraband.

Nothing short of the highest praise can be given to this simple and logical method of presenting a subject. It is preëminently the part of a teacher to exhibit not only the actual state of the law at the time, but the growth of the law and the fundamental principles underlying a given system of rules. It is in this respect that Professor Oppenheim's treatise will be of especial service to the students for whom the author says that it is primarily intended.

CHARLES G. FENWICK.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For table of abbreviations see Chronicle of International Events, p. 375]

- Aeronautics.* French military aviation in 1912. *T. F. Farman.* Blackwoods, 193:58. Jan.
- . Problemas de derecho aereo. *Max Henriquez Ureña.* R. juridica, 1:301. Oct.
- Agents.* Immunities of diplomatic agents and consuls. R. de dr. int. et. dip. [Tokyo. Japanese text.] Oct., 1912.
- Albania.* Albania's fate. Lit. Dig., 46:123. Jan.
- . Albania ed Albanesi. Guido Cora. Nuova Antol., 173:330. Feb.
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- . Albanie et les Albanais, L'. *Gabriel Louis-Jaray.* R. pol. et parl., 75:239. Feb.
- . Albanie et ses limites, L'. *Gaston Gravier.* R. de Paris, 20:200, 433. Jan.
- . Austria and the Albanian question. R. of R., 46:737. Dec.
- . Conflit Austro-Serbe et la question Albanaise, Le. *J. du Pontcraiy.* Nouvelle R., 5 [N. S.], 360. Feb.
- . Europe and the problem of Albania. Liv. Age, 275:808. Dec.
- . Independence albanaise et le débouche Serbe sur l'Adriatique, L'. *Leon Lanonche.* R. pol. et parl., 74:31. Jan.
- . Question albanaise, La. *A. Baldacci et G. Louis-Jaray.* R. écon. int., 4:251. Oct.
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- Armenia.* Question arménienne, La. *K. T. Khairallah.* Q. dip., 35:65. Jan.
- Association for International Conciliation.* Verband für internationale Verständigung. Vie int., 2:277.
- Balkans.* Armies of the Balkan league. *H. C. Woods.* Fort., 98:1060. Dec.
- . Austria-Hungary and the Balkan War. R. of R., 47:101. Jan.
- . Austria-Hungary as a Balkan power. *R. W. Seton-Watson.* Contemp., 102:801. Dec.
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—. Conference of St. James, The. *M. G. Brit.*, R., 1:1. Feb.
—. Coup de théâtre de Constantinople, Le. *Commandant de Thomasson.* *Q. dip.*, 35:129. Feb.
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—. Développement de la crise orientale, Le. *Commandant de Thomasson.* *Q. dip.*, 34:645. Dec.
—. Diplomacy and the Balkan war. *E. J. Dillon.* *Contemp.*, 102:865; 103:109, 261, 414. Dec.-March.
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—. Gewalten im Balkankriege. *L. Raschdau.* *Deutsche Runds.*, 39:408. March.
—. Grossmächte und der Orientkrieg, Die. *Benedetto G. Firmeni.* *Deutsche R.*, 38:268. March.
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- . Unificación del derecho relativo al cheque. Centro-América, 4:565.
- . Unification du droit relatif à la lettre de change, L'. *T. M. C. Asser.* R. de dr. int. et de légis. comp., 15:5.
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- Boundaries.* Eastern boundary of California in the convention of 1849. *Cardinal Goodwin.* Southwestern Hist. Q., 16:227. Jan.
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- . Means of unifying China. *Charles W. Eliot.* J. of Race Development, 3:237. Jan.
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- France.* Notre littoral est-il défendu? * * * R. de Paris, 20:805. Feb.
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- . Backward nation, The. *Count Albert Apponyi.* Independent, 74:513. March.
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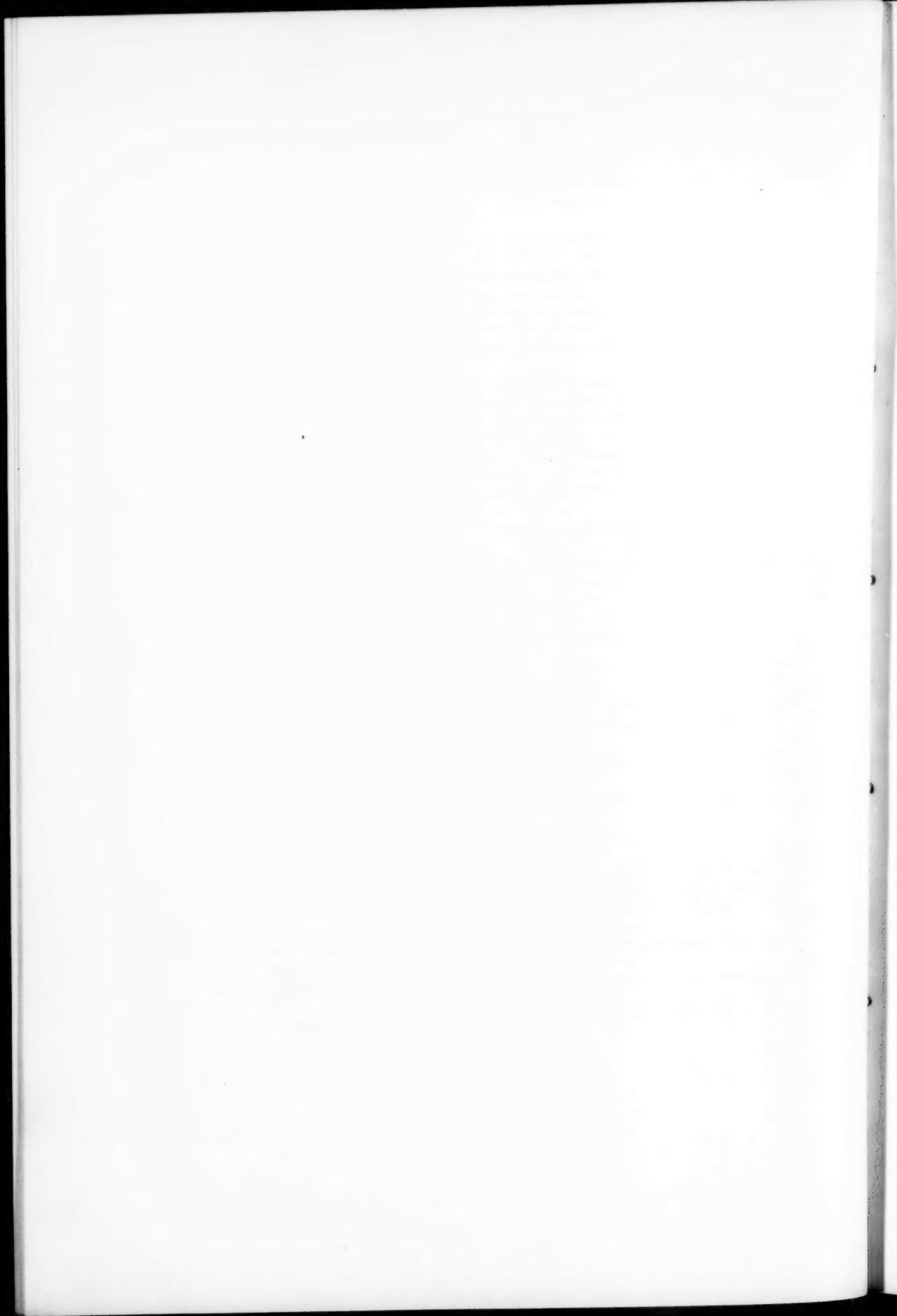
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KATHYRN SELLERS.



FRANCIS LIEBER¹

This year, 1913, is the fiftieth anniversary of a very important event in the history of international law — the adoption and enforcement by the American Government of the code of rules governing the conduct of armies in the field, which is known to the American army as General Orders No. 100, of 1863. It happens that without any intention to create a coincidence the seventh annual meeting of the American Society of International Law is appointed and we are met here, exactly fifty years after the twenty-fourth day of April, 1863, when President Lincoln promulgated that famous order. It seems appropriate for this Society at this time to celebrate the event by paying honor to Francis Lieber, the author of the instructions embodied in the order.

In the early stages of the American Civil War both parties put into the field immense armies, commanded for the most part by volunteer officers drawn from the ordinary occupations of civil life and quite ignorant of the laws and usages of war. The sources of information were to be found only in scattered text-books and treatises, most of them in foreign languages, few of them readily accessible, and requiring the painstaking and diligent labor of the student to search out rules which were at the best subject to doubt and dispute. It was manifest that the officers of the Union and Confederate armies had neither time nor opportunity to enter upon an extended study of the international laws of war, and that unless some one indicated to these uninstructed and untrained combatants what was and what was not permissible in warfare, the conflict would be waged without those restraints upon the savage side of human nature, by which modern civilization has somewhat mitigated and confined the barbarous cruelties of war. Fortunately, General Halleck, who was put in chief command of the Union army in July, 1862, was an accomplished student of international law.

¹ Opening address by Elihu Root as President of the American Society of International Law at the Seventh Annual Meeting, Washington, April 24, 1913.

He had already published an excellent book on that subject. While the duties of commanding general during an active conflict left him no time for research and codification himself, he knew what ought to be done and how it ought to be done; and he called Francis Lieber, then a professor in Columbia College, and already a publicist distinguished upon both sides of the Atlantic, to the assistance of the government. The first service which Lieber rendered was the preparation in 1862 of a statement or essay upon *Guerilla Parties Considered with Reference to the Laws and Usages of War*. One cannot read this paper now, with its definite and lucid statements based upon grounds of reason and supported by historical reference, without feeling that it must have been a real satisfaction to the burdened and harassed Union authorities at Washington to have such a guide in dealing with the multitude of cases continually arising in that debatable land which intervenes between disciplined and responsible warfare on the one hand and simple robbery and murder on the other.

On the seventeenth of December, 1862, by order of Secretary Stanton, a board was created "to propose amendments or changes in the rules and articles of war and a code of regulations for the government of armies in the field as authorized by the laws and usages of war," and this board was made up of Francis Lieber, LL. D., and four volunteer officers, Generals Hitchcock, Cadwalader, Hartsuff and Martindale. That part of the board's work which consisted of preparing the code of regulations appears to have been committed to Dr. Lieber. The nature of the field upon which he entered and the spirit in which he did his work are indicated by Lieber's letter transmitting the result to General Halleck, on the 20th of February, 1863.

MY DEAR GENERAL:

Here is the project of the code I was charged with drawing up. I am going to send fifty copies to General Hitchcock for distribution, and I earnestly ask for suggestions and amendments. I am going to send for that purpose a copy to General Scott, and another to Hon. Horace Binney. * * * I have earnestly endeavored to treat of these grave topics conscientiously and comprehensively; and you, well-read in the literature of this branch of international law, know that nothing of the kind exists in any language. I had no guide, no groundwork, no text-book. I can assure you, as a friend, that no counselor of Justinian sat down to his task of the Digest with a deeper feeling

of the gravity of his labor, than filled my breast in the laying down for the first time such a code, where nearly everything was floating. Usage, history, reason, and conscientiousness, a sincere love of truth, justice and civilization have been my guides; but of course the whole must be still very imperfect. * * *

Lieber's estimate of the work and of the occasion for it is shown in a letter from him to General Halleck of the 20th of May, 1863:

My dear General,— I have the copy of General Orders 100 which you sent me. The generals of the board have added some valuable parts; but there have also been a few things omitted, which I regret. As the order now stands, I think that No. 100 will do honor to our country. It will be adopted as a basis for similar works by the English, French, and Germans. It is a contribution by the United States to the stock of common civilization. I feel almost sad in closing this business. Let me hope it will not put a stop to our correspondence. I regret that your name is not visibly connected with this Code. *You* do not regret it, because you are void of ambition,— to a faulty degree, as it seems to me * * *. I believe it is now time for you to issue a strong order, directing attention to those paragraphs in the Code which prohibit devastation, demolition of private property, etc. I know by letters from the West and the South, written by men on our side, that the wanton destruction of property by our men is alarming. It does incalculable injury. It demoralizes our troops; it annihilates wealth irrecoverably, and makes a return to a state of peace more and more difficult. Your order, though impressive and even sharp, might be written with reference to the Code, and pointing out the disastrous consequences of reckless devastation, in such a manner as not to furnish our reckless enemy with new arguments for his savagery. * * *

The instructions comprise one hundred and fifty-seven articles. The scope of the work can be indicated briefly by stating the titles of the ten sections in which the articles are grouped.

Martial Law; Military Jurisdiction; Military Necessity; Retaliation.

Public and Private Property of the Enemy; Protection of Prisoners, and especially Women; of Religion, the Arts and Sciences — Punishment of Crimes Against the Inhabitants of Hostile Countries.

Deserters; Prisoners of War; Hostages; Booty on the Battlefield.

Partisans; Armed Enemies not Belonging to Hostile Armies; Scouts; Armed Prowlers; War Rebels.

Safe Conduct; Spies; War Traitors; Captured Messengers; Abuse of the Flag of Truce.

Exchange of Prisoners; Flags of Truce; Flags of Protection.

The Parole.

Armistice — Capitulation.
Assassination.
Insurrection; Civil War; Rebellion.

The provisions on these subjects give evidence of great learning and careful consideration. They covered the entire historical field of questions which had arisen and the possibilities of questions likely to arise, calling for instruction and direction. The definitions are clear, the injunctions and prohibitions distinct and unambiguous, and, while the instrument was a practical presentation of what the laws and usages of war were, and not a technical discussion of what the writer thought they ought to be, in all its parts may be discerned an instinctive selection of the best and most humane practice and an assertion of the control of morals to the limit permitted by the dreadful business in which the rules were to be applied.

These instructions directed the action of the Union officers and controlled the conduct of the Union forces during that great war which ended in the triumph of the armies on which their limitations were imposed. No one can say how far it was due to the instructions, but in honoring the memory of Francis Lieber we should not forget that after the surrender and the triumph came reconciliation, friendship, the restoration of a united country, and, beyond all human experience, even within the lifetime of the generation which had waged the conflict, freedom from the bitterness of spirit that time cannot soften.

Although the instructions were prepared for use in a civil war, a great part of them were of general application, and they were adopted by the German Government for the conduct of its armies in the field in the war of 1870 with France. It is interesting that this work of a simple private citizen should become the law controlling the mightiest forces of both the country of his adoption and the country of his birth. The sanction of two powerful governments for these rules and their successful employment in two of the greatest wars of modern times gave to them an authority never before acquired by any codification or statement of any considerable number of rules intended for international application. The prediction of Lieber that General Orders No. 100 would do honor to our country, that it would be adopted as a basis for similar works by the English, French, and Germans, and that it would

be a contribution by the United States to the stock of common civilization, was justified. In the Brussels Conference of 1874, convened at the instance of the Emperor of Russia for the purpose of codifying the laws and customs of war, the Russian delegate, Baron Jomini, as president of the conference, declared that the project of an international convention then presented had its origin in the rules of President Lincoln. The convention agreed upon at Brussels was not ratified, but in 1880 the Institute of International Law made the work of the Brussels Conference and the work of Lieber, which so far as it was of general application was incorporated in that convention, the basis of a manual of the laws of war upon land; and finally, in The Hague Conferences of 1899 and 1907, the conventions with respect to the laws and customs of war on land gave the adherence of the whole civilized world in substance and effect to those international rules which President Lincoln made binding upon the American armies fifty years ago. Writing of Lieber's work, Sheldon Amos says in his book on *Political and Legal Remedies for War*:

The instructions were, in fact, the first attempt to make a comprehensive survey of all the exigencies to which a war of invasion is likely to give rise; and it is said on good authority that, with one exception (that of concealing in an occupied district arms or provisions for the enemy), no case presented itself during the Franco-German War of 1870 which had not been provided for in the American instructions.

Frederic de Martens, after describing the way in which Lieber's work came to be done, says:

So it is to the United States of North America and to President Lincoln that belongs the honor of having taken the initiative in defining with precision the customs and laws of war. This first official attempt to codify the customs of war and to collect in a code the rules binding upon military forces has notably contributed to impress the character of humanity upon the conduct of the northern states in the course of that war.

Bluntschli says, in his article on *Lieber's Service to Political Science and International Law*:

The Instructions for the Government of Armies of the United States in the Field were drawn up by Lieber at the instance of President Lincoln, and formed the first codification of International Articles of War.

This was a deed of great moment in the history of international law and civilization. Throughout this work also we see the stamp of Lieber's peculiar genius. His legal injunctions rest upon the foundation of moral precepts. The former are not always sharply distinguished from moral injunctions, but nevertheless, through a union with the same, are ennobled and exalted. Everywhere reigns in this body of law the spirit of humanity, which spirit recognizes as fellow-beings, with lawful rights, our very enemies, and which forbids our visiting upon them unnecessary injury, cruelty, or destruction. But at the same time, our legislator remains fully aware that, in time of war, it is absolutely necessary to provide for the safety of armies and for the successful conduct of a campaign; that, to those engaged in it, the harshest measures and most reckless exactions cannot be denied; and that tender-hearted sentimentality is here all the more out of place, because the greater the energy employed in carrying on the war, the sooner will it be brought to an end, and the normal condition of peace restored.

Then follows a very interesting statement by Bluntschli which points out a consequence of the instructions not the least in value to the student of international law and to the development of that science upon which the hoped-for peace of the world so largely depends. It appears that Bluntschli found in Lieber's work the inspiration of his celebrated codification of international law, for he says:

These instructions prepared by Lieber, prompted me to draw up, after his model, first, the laws of war, and then, in general, the law of nations, in the form of a code, or law book, which should express the present state of the legal consciousness of civilized peoples.

Professor Ernest Nys sums up the far-reaching effect of Lieber's codification by the statement:

The ideas of the American publicist have penetrated not only the scientific world through the works of Bluntschli, but by the work of the Conferences of Brussels, in 1874, and The Hague in 1899 and 1907, they have penetrated international politics.

Major General George B. Davis, who is specially qualified to treat of the subject from the different points of view of the Judge Advocate General of the Army and of the international lawyer, has kindly furnished me with a memorandum upon the relations in detail between General Orders 100 and the Hague conventions, and I will ask the Secretary to print the memorandum in the proceedings with this paper.²

² Printed as an appendix to this article, p. 466.

When we recall the frightful cruelties upon combatants, upon prisoners, upon citizens, the overturning of all human rights to life and liberty and property, the fiendish malignity of oppression by brutal force, which have characterized the history of war, we cannot fail to set a high estimate upon the service of the man who gave form and direction and effectiveness to the civilizing movement by which man at his best, through the concurrence of nations, imposes the restraint of rules of right conduct, upon man at his worst, in the extreme exercise of force.

Let me say something about the man himself. He was born in Berlin on the 18th of March, 1800. His childhood was passed in those distressful times when the declaration of the rights of man and the great upheaval of the French Revolution had inspired throughout the continent of Europe a conception of popular liberty and awakened a strong desire to attain it, while the people of Prussia were held in the strictest subjection to an autocratic government of inveterate and uncompromising traditions. In the meantime foreign conquest, with the object lessons of Jena and Friedland and the Confederation of the Rhine, threatened the destruction of national independence; and love of country urged Germans to the support of a government which the love of liberty urged them to condemn. It was one of the rare periods in which political ideas force themselves into the thought and feeling of every intelligent life, and, alongside with the struggle for subsistence, the average man finds himself driven by a sense of necessity into a struggle for liberty, opportunity, peace, order, security for life and property — things which in ordinary times he vaguely assumes to come by nature like the air he breathes. So the early ideas of the child were filled with deep impressions of the public life of the time. He remembered the entry of Napoleon into Berlin after Jena. He remembered the humiliation of the peace of Tilsit. He remembered Schill, the defender of Colberg, and Stein, and Scharnhorst. He was a disciple of Dr. Jahn, the manual trainer of German patriotism. At fifteen, after the escape from Elba, he enlisted in the Colberg regiment and fought under Blücher at Waterloo. He was seriously wounded in the Battle of Namur and had the strange and vital discipline of lying long on the battlefield in expectation of death. He was a member of patriotic societies and was arrested

in his nineteenth year, and imprisoned four months on suspicion of dangerous political designs. He was excluded from membership in the German universities, except Jena, where he received his degree of Doctor of Philosophy in 1820. At twenty-one he made his way to Greece with a company of other young Germans, inspired, by a generous enthusiasm for liberty, to an unavailing attempt to aid in the Greek War of Independence. Returning penniless from Greece he found his way to Rome, became a tutor in the family of Barthold George Niebuhr, then Prussian Ambassador, and there he won the confidence and life-long friendship of that great historian whose influence in familiar intercourse both increased the learning and calmed and sobered the judgment of the impetuous youth. Returning to Prussia, he was again arrested and imprisoned for nearly a year upon charges of disaffection to the government. Released through the intercession of Niebuhr, he went to England, and after a year's hard struggle there, he came, in 1827, to the United States and to Boston. Seeking employment he found it in taking charge of the Boston Gymnasium. Through Niebuhr's good offices he became the American correspondent of a group of German newspapers. He devised a plan for the publication of an encyclopedia, and for this he secured a distinguished list of contributors and associates. He became its editor, and in 1829 the publication of the *Encyclopedia Americana* was begun. It was a distinct success. Lieber's connection with it not only forced him to a broad and accurate knowledge of American life, but brought him in contact with a great range of leaders of American thought and opinion, and this association gave him an intimate knowledge of American social conditions and public affairs. Bancroft, and Hilliard, and Everett, and Story, and Nicholas Biddle, and Charles Sumner were among his friends. In June, 1835, he was made Professor of History and Political Economy in South Carolina College, and for twenty-two years he held that chair, until, in 1857, he was called to Columbia College to be Professor of Modern History, Political Science, International Law, Civil and Common Law. His connection with Columbia and his residence in New York continued until his death in October, 1872. In the meantime, to the service as adviser to the government, which I have already described, he added the classification and arrangement of the Confederate

archives in the office of the War Department, and long served as umpire under the Mexican Claims Commission of July 4, 1868.

Lieber himself has said that his life had been made up of many geological layers. The transition from his adventurous youth to the life of an American college professor did indeed carry him from igneous to sedimentary conditions. Under the new conditions, however, his surpassing energy and capacity for application found exercise in authorship. His work on *Political Ethics*, published in 1838, and that on *Civil Liberty and Self Government*, published in 1853, gave him high rank among writers upon the philosophy of government. Judge Story said of the former:

It contains by far the fullest and most correct development of the true theory of what constitutes the state that I have ever seen. It abounds with profound views of government which are illustrated with various learning. To me many of the thoughts are new, and striking as they are new. I do not hesitate to say that it constitutes one of the best theoretical treatises on the true nature and objects of government which has been produced in modern times, containing much for instruction, much for admonition, and much for deep meditation, addressing itself to the wise and virtuous of all countries.

And in an introduction to the latter work, Theodore Dwight Woolsey said:

It would be a grateful task to speak at length here of the service Doctor Lieber rendered to political science in this country. * * * He was indeed the founder of this science in this country in so far as by his method, his fulness of historical illustration, his noble, ethical feeling, his sound practical judgment, which was of the English rather than of the German type, he secured readers among the first men of the land, influenced political thought more than any one of his contemporaries in the United States, and made I think, a lasting impression on many students who were forming themselves for the work of life.

By a great variety of miscellaneous essays, addresses, and magazine articles on subjects of education, penology, history, biography, constitutional, and international law, he exercised a powerful influence upon the development of American thought. By voluminous correspondence with many foremost Americans who were engaged in public affairs he made his influence felt upon the solution of specific questions in the

conduct of government. A correspondence of many years with Charles Sumner is especially rich in matter of this description.

The philosophical habit of the German, the practical habit of the Englishman, the freedom from traditional limitations upon thought of the American, the breadth of view of his cosmopolitan experience, the intensity of his enthusiasm at once for liberty and for order, and the strength of his genuine sympathy for all mankind combined to set him in advance of his time in his views upon international law and his proposals for its development. We find him writing to Sumner on the 27th of December, 1861, after the Trent Affair — more than fifty years ago:

This would be a fair occasion to propose a congress of all maritime nations, European and American, to settle some more canons of the law of nations than were settled at the Peace of Paris, — canons chiefly or exclusively relating to the rights and duties of belligerents and neutrals on the sea; for there lies the chief difficulty. The sea belongs to all; hence the difficulty of the sea police, because there all are equals. I mean no codification of international law; I mean that such a congress, avowedly convened for such a purpose, should take some more canons out of the cloudy realm of precedents than the Peace of Paris did almost incidentally. Suppose Russia, Austria, and other nations (naming them) could be induced to send, each power, two jurists (with naval advisers if they chose), does any one, who knows how swelling civilization courses in our history, doubt that their debates and resolutions would remain useless, — even though the whole should lead, this time, to no more than an experiment? All those ideas that are now great and large blessings of our race, having wrought themselves into constitutions or law systems, belonged once to Utopia.

On the 16th of April, 1866, he writes to Bluntschli in Heidelberg:

Your intention to write a brief code on the Rights of Nations, in the middle of the nineteenth century, is a noble and daring one. For a long time it was a favorite project of mine that four or five of the most distinguished jurists should hold a congress in order to decide on several important but still unsettled questions of national equity, and perhaps draw up a code. First I proposed that it should be an official congress under the government, and corresponded with Senator Sumner on the subject. But after awhile it became clear to me that it would be much better if a private congress were established, whose work would stand as an authority by its excellence, truthfulness, justice, and superiority in every respect.

June 18, 1866, to his wife:

Have you read the noble declaration of Prussia, that she will not capture enemies' property at sea during war? Such things warm one like a glass of burgundy. * * *

December 15, 1866, to Andrew D. White:

I fancy sometimes — but only fancy — how fine a thing it would be for one of the Peabodies, or some such gold vessel, to give, say twenty-five thousand dollars gold, for the holding of a private—*i. e.*, not diplomatic, although international — congress of some eight or ten jurists, to concentrate international authority and combined weight on certain great points, on which we have now only individual authorities. I have spoken about this years ago to Mr. Field.

On the 11th of June, 1868, to Sumner:

What an advance it would be — though requiring nearly twenty-two centuries — from the time when Thucydides said that private property was not acknowledged at sea as on land, to the middle of the nineteenth century, when private property — even of the enemy — should be declared to be protected, even floating without defence, on the wide sea. * * * I say that civilization would hardly have made or be able to make a greater stride in our century, than by the United States and North Germany agreeing on the great principle and thus inducing others to follow.

On May 7, 1869, to Judge Thayer:

The strength, authority, and grandeur of the law of nations rests on, and consists in, the very fact that reason, justice, equity, speak through men "greater than he who takes a city"—single men, plain Grotius; and that nations, and even Congresses of Vienna, cannot avoid hearing, acknowledging, and quoting them. But it has ever been, and is still, a favorite idea of mine that there should be a congress of from five to ten acknowledged jurists to settle a dozen or two of important yet unsettled points — a private and boldly self-appointed congress, whose whole authority should rest on the inherent truth and energy of their own *proclama*.

On the 10th of April, 1872, to General Dufour, honorary president of the International Committee of Geneva:

One of far the most effectual and beneficent things that, at this very juncture, could be done for the promotion of the intercourse of nations in peace or war (and there is *intercourse* in war, since man cannot meet man without intercourse) — one of the most promising things in mat-

ters of internationalism, would be the meeting of the most prominent jurists of the law of nations, of our Cis-Caucasian race — one from each country in their individual and not in any public capacity — to settle among themselves certain great questions of the law of nations as yet unsettled, such as neutrality, or the aid of barbarians, or the duration of the claims of obligations, of citizenship. I mean *settle* as Grotius *settled*, — by the strength of the great argument of justice. A code of proclamation, as it were, of such a body, would soon acquire far greater authority than the book of the greatest single jurist. I hope such a meeting may be brought about in 1874.

On the 26th of May, 1872, to Von Holtzendorff:

In 1846, in one of my writings, I recalled the fact that under Adrian, professors were appointed to lecture in different places, and Polemon of Laodicea instructed in oratory at Rome, Laodicea, Smyrna, and Alexandria. The traveling professor had a free passage on the emperor's ships, or on the vessels laden with grain. In our days of steamboats and railroads the traveling professor should be reinstated. Why could not the same person teach in New York and in Strasburg?

You will perceive that here was a proposal of the exchange professorship, which we are putting in practice forty years after. Here was another proposal which was realized by the formation of the Institute of International Law. Of this Professor Bluntschli says:

Lieber had great influence, I may add, in founding the *Institut de Droit International*, which was started in Ghent, in 1873, and forms a permanent alliance of leading international jurists from all civilized nations, for the purpose of working harmoniously together, and thus serving as an organ for the legal consciousness of the civilized world. Lieber was the first to propose and to encourage the idea of professional jurists of all nations thus coming together for consultation, and seeking to establish a common understanding. From this impulse proceeded Rolin-Jaequemyns' circular letter, drawn up in Ghent, calling together a number of men eminent for their learning. This latter proposal to found a *permanent academy for International Law* met with general acceptance, but this was merely a further development of the original idea of Lieber, which was at the bottom of the whole scheme.

Here also was the proposal for a meeting of official representatives which was the precursor of the conferences at The Hague. It is interesting to observe that while Lieber considered the unofficial meeting to be an alternative for the official one, both have been realized, and in

practice the work of the unofficial members of the Institute of International Law has made possible the success of the official conferences at The Hague, by preparing their work beforehand and agreeing upon conclusions which the official conferences could accept.

The important characteristic which marshaled all Lieber's forces for leadership of opinion and gave his work its chief and permanent value was an elevation of spirit, a pervading moral quality which was refined by adversity and trial throughout the formative period of his life; and this quality was well expressed by two maxims which he made his guides. He says, in writing to Judge Thayer:

From early times I observed that in the French Revolution people had always clamored for rights and never thought of duty; that more or less this is the case in all periods of agitation, and almost universally so in our own times and in our country * * * *right and duty*: both together, and all is well; right alone, despotism, — duty alone, slavery.

And, writing to Sumner, he says:

Let me now give you what I consider my chief law maxim: *Nullum jus sine officio, nullum officium sine jure*, — forgotten by despot and *Rouge* (they want nothing but rights), forgotten by the slave who thinks he has nothing but duty or obligation.

And this he condensed into the maxim: "*Droit oblige*."

The other maxim he kept displayed on the walls of his lecture room: "*Patria Cara: Carior Libertas: Veritas Carissima*." And these maxims he exemplified in his life and in his service to mankind.

He was no dry student delving for knowledge he could not use; but a living soul instinct with human sympathy and love of liberty and justice, seizing eagerly the weapons of learning to strike blows in the struggle for nobler and happier life among men. He was no vapid theorist who "argued about it and about, and evermore came out the same door wherein he went," but a sagacious, practical man among men, dealing with human nature as it was, with all its weakness and folly and error, all its nobility and power; and seeking to shape the human material upon which he wrought to its best uses according to its real capacity and strength.

It was a wonderful career. It was a great thing to be the author of

the *Instructions*. It was a great thing to give the impetus which produced the *Institut de Droit International* and made possible the success of the Hague Conferences. It was a great thing to be the man he was and to live a long life, loving learning and law, and liberty, and country, and kind, and blessed by consciousness of distinguished service to them all. It stirs the imagination that the boy who lay wounded on the battlefield of Namur for his country's sake and who languished in prison for liberty's sake and who left his native land that he might be free, should build his life into the structure of American self-government and leave a name honored by scholars and patriots the world over.

If our Society, at once national and international, were about to choose a patron saint, and the roll were to be called, my voice for one would answer "Francis Lieber."

ELIHU ROOT.

APPENDIX

MEMORANDUM SHOWING THE RELATION BETWEEN GENERAL ORDERS NO. 100 AND THE HAGUE CONVENTION WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND

Prepared by Major General George B. Davis, U. S. Army

<i>Lieber's Instructions</i>	<i>Hague Convention of 1899</i>
1-13 Martial Law.	Not mentioned, but cf. Arts. 42-56 on military occupation.
14-16 Military necessity.	In several articles. Arts. 23 and 40.
17, 18 Resort to starvation.	Not mentioned.
19 Notice of bombardment.	Art. 26.
20 Definition of war.	Not mentioned.
21 Status of enemy subjects.	Not mentioned.
22-25 Same subject.	Arts. 46-52.
26 Oath of temporary allegiance.	In Art. 45 a contrary view is expressed.
27-28 Retaliation.	Not mentioned.
29-30 Character of wars.	Not mentioned.

31	Appropriation of public money and property by belligerent.	Arts. 48-53.
32	Abolition of slavery.	Not mentioned.
33	Citizens of occupied terri- tory not to be compelled to serve belligerent.	Art. 44.
34-37	Property belonging to reli- gious or charitable foun- dations, or used for such purposes.	Art. 56.
38	Treatment of private prop- erty.	Art. 52.
39-41	Administration of occupied territory.	Arts. 43-49.
42-43	Slavery.	Not mentioned.
44	Protection of non-combat- ants.	Arts. 42-47.
46	Booty, prize.	Art. 45.
47	Crime in occupied territory.	Art. 43.
48	Deserters, recapture of, in service of the enemy.	Not mentioned. Offense punished by local law in Europe.
49-53	Prisoners of war. 56-67 have same subject.	Arts. 4-20.
49	Definition of "prisoner of war."	Not defined.
50	Same subject.	Art. 13.
51-52	Levies en masse are treated as prisoners of war.	Art. 2.
53	Surgeons, chaplains, etc.	Not mentioned; covered by Geneva Convention of Aug. 22, 1864.
54-55	Hostages.	Not mentioned, practice of giving them being obsolete in Euro- pean war.
56-67	Treatment of prisoners of war.	Art. 4.

57-58	Colored troops.	Unknown in European war.
59	Crimes committed by prisoners of war.	Art. 8.
60-63, 66	Quarter.	Art. 23 (d)
64	Captured uniforms may be used with a distinctive badge.	Not mentioned.
66	Prohibited acts.	Art. 22.
68	Firing on outposts.	Not mentioned.
70	Poisoned weapons.	Art. 23 (a)
71	Additional wounding of prisoners.	Art. 23 (c)
72	Property of prisoners of war.	Art. 4.
73	Arms of prisoners of war.	Art. 4.
74	Ransom.	Not mentioned. Obsolete in European war.
75	Character of confinement.	Art. 5.
76	Subsistence of prisoners.	Art. 7.
76	Labor of prisoners.	Art. 6.
77	Escape of prisoners of war.	Art. 8.
78	Same subject. Penalty.	Art. 8.
79	Medical attendance of prisoners.	Art. 7.
80	Extortion of information from prisoners of war.	Art. 9, in part.
81	Definition of term "partisan."	Not mentioned.
82-84	Guerillas and	Not mentioned.
85, 102, 103	War rebels.	Not mentioned.
86-87	Safe conducts.	Not mentioned.
83, 88, 104	Spies.	Arts. 29-31.
89, 98	Giving information to enemy.	Not mentioned.
90-92, 102, 103.	War traitors.	Not mentioned.
93-97.	Guides.	Art. 24, in part.

99, 100	Messengers. Carriers of despatches.	Not mentioned.
105-110	Exchange of prisoners.	Not mentioned.
107	True name of prisoner.	Art. 9.
111-114	Flags of truce.	Arts. 32-34.
115-118	Designating flags for hos- pitals and protected buildings.	Art. 27.
119-134	Paroles.	Arts. 10-12.
135-147	Truces and armistices.	Arts. 36-41.
144	Capitulations.	Art. 35.
148	Assassination.	Art. 23 (b)
149-157	Insurrection, Civil War, Rebellion.	Not mentioned, as The Hague rules of 1899 were primarily intended to regulate operations of war between sovereign states. No European state would bind it- self, save in the most general way, in carrying on operations incident to the suppression of rebellion.

SOVEREIGNTY OF THE AIR

When Grotius was a young lawyer he served for a time as counsel for the Dutch East India Company. Out of his early labors as a corporation lawyer there grew later two wonderful books — one the *De Jure Belli et Pacis*, the greatest gift that any lawyer ever gave to the world, and the other, published in 1608, the *Mare Liberum*. In 1868, came to light the brief which he had written in a celebrated case in which the company had captured a rich Portuguese galleon in the Straits of Malacca. It was found that one chapter of the *Mare Liberum* had been taken bodily from this brief. At the time the book was written, Portugal claimed dominion of the eastern and England of the northern seas. John Selden of the Inner Temple, most famous of English legal scholars, answered Grotius by a work entitled *Mare Clausum*; but the stars in their courses fought against Selden and today the world rejoices in the freedom of the seas.

Three hundred years have swept over that great controversy, and now in our own day again the international lawyers of the world are marshaled in controversy. This time they are contesting over the freedom of the air. Fauchille, like a new Grotius, is pleading the cause of aerial liberty, and English scholars once more are the advocates of exclusive dominion. This time, has the Englishman a better case than before? There are not a few jurists on the continent as well as in England who think that he has.

At first thought there is something almost revolting in the idea that this new and universal means of communication through the air, the latest gift of human genius, should no sooner be discovered than states should begin to raise invisible barriers against its exercise. A little reflection should convince us, however, that there can be no unchartered freedom anywhere. Man takes his law with him upon the seas, and the security of states and safety of mankind must make the very air subject to dominion. When men explore its azure depths obedience

must fly with them. We live in the age when man has reached the poles and made conquest of the air!

In one of the poems of Erasmus Darwin (1731-1802), the grandfather of Charles Darwin, we find these words:

Soon shall thy arm, unconquered steam, afar,
Drag the slow barge and drive the rapid car;
Or on wide waving wings expanded bear
The flying chariot through the streams of air;
Fair crews triumphant leaning from above
Shall wave their fluttering kerchiefs as they move;
Or warrior bands alarm the gaping crowd
And armies shrink beneath the shadowy cloud.

It was expecting too much of any poet to prophesy a better motor than steam, or that men would fly on wings which do not wave at all. The poet Gray could no longer write of man that he inherits

Nor the pride, nor ample pinion
That the Theban Eagle bear,
Sailing with supreme dominion
Through the azure deep of air.

And even yet we have not realized the vision of Tennyson, when he

Saw the Heavens fill with commerce, argosies of magic sails,
Pilots of the purple twilight, dropping down with costly bales.

Entering upon an investigation of the subject of the sovereignty of the air with the innocent idea that it offered a new field of inquiry, I found that the literature of the topic is already so rich that to examine it all would be a serious task indeed. While the material in English is not very extensive, in French and German it is quite large, and so many acute minds have attacked the subject from its various points of view that nothing short of genius could accomplish originality in discussing it. The task is rather to select between the numerous views which have been propounded to deal with the new and interesting situation, than to find a solution of a problem never faced before. Having embarked, however, upon the sea, or perhaps I should say the air, of literature upon this subject, there was no help for it except to make my way to

land as best I could. It might be well to refer at the outset to some of this literature.

The first treatment of the subject in this country with which I am acquainted is the article upon "The Law of the Air-Ship" by Governor Simeon E. Baldwin, published in 1910 in the fourth volume of this JOURNAL, at page 95, he being also the draftsman of the first American statute upon the subject, the Connecticut Act of June 8, 1911. Governor Baldwin inclines to the view that a man has no legal right at all over the air above his land so far as its occupation by others could not be of injury to his estate, pointing out that this is the modern and enlightened view as embodied in the German Civil Code of 1900, Sec. 905, and the new Swiss Civil Code, Sec. 667.

Upon the question of liability for a descent upon private property, Judge Baldwin supports the view that the aéronaut should be held absolutely liable for damage to others resulting from his flight, even in the absence of negligence.

In the same volume of the AMERICAN JOURNAL OF INTERNATIONAL LAW, at page 109, will be found an article by Mr. Arthur K. Kuhn entitled "The Beginnings of an Aërial Law." Mr. Kuhn opposes the doctrine adopted by the Institute of International Law at its Ghent session of 1906 (*Annuaire*, 1906, p. 305) that the air is free and that states have only such rights over it in time of peace and in time of war as are necessary for their conservation, supporting the contrary view of Westlake that the state is sovereign over the superincumbent air, but that there is a right of innocent passage similar to that prevailing in territorial waters. Upon the question whether or not the passage of an air-ship over land is a trespass upon the rights of the landowner, he supports the suggestion of Sir Frederick Pollock that the scope of possible trespass is limited by that of effective possession, for example, that the passage of projectiles through the air at a great height would not be a trespass. No more should be the passage of an airship in regions where effective possession of the air is impossible.

In Volume 5, page 171, of the *American Political Science Review*, Professor George Grafton Wilson, of Harvard University and the Naval War College, has declared himself for the principle that a state has jurisdiction over the aërial space above its territory and that the juris-

diction of the subjacent state is exclusive and any right of navigation of the air space ought to be arranged by international conferences.

Professor Hershey's *Essentials of International Public Law*, published last year, contains chapters on the law of the aerial space in time of peace, and also on aerial warfare, with excellent bibliographies. Dr. Hershey accepts the analogy of the air to territorial waters.

Let us turn now to some of the English writers.

In a lecture upon the "Sovereignty over the Air," delivered before the University of Oxford on October 26, 1912, by Sir H. Erle Richards, Professor of International Law and Diplomacy, after stating that the true reason of the law which gives to states the sovereignty over the belt of the high seas adjoining their coasts and over the bays and other indentations on their shores, is that such rights are necessary for the preservation and protection of their territories, he claims that the same principle requires that states should have full sovereignty over the air above them, for the presence of any vessel overhead is a source of danger to persons and property beneath. He claims that the English Aërial Navigation Act of 1911 is a direct assertion of sovereignty over all air vessels, irrespective of altitudes, and supports himself upon the proposition that the passage of an aeronaut at any height over the land of another constitutes a trespass, citing the views of the judges in the cases of *Pickering v. Rudd*, (1815), 4 Camp. 219, 220; *Kenyon v. Hart* (1865), 6 B. & S. 249, 252; *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. 904; and *Finchley Electric Light Co. v. Finchley Urban Council* (1903), 1 Ch. 440. Indeed, he claims that this is also the private law of other countries as well. Since the private citizen has an unlimited ownership, by analogy the state should possess an unlimited jurisdiction. He contests the idea that there is any right of innocent passage through the air at any height, and points out that the range of cannon is now sufficient to cover any height of the air practical for the purposes of navigation. As a result of this position he maintains that in case of war it would be the duty of neutral states to hinder the operations of belligerents above their territories, including the passage of air-ships of war.

In an interesting article by H. B. Leech upon "The Jurisprudence of the Air," in the *Fortnightly Review* for August, 1912, the author points

out the difficulty which the use of air-ships will create in making a blockade effective. No one is under obligation to regard a blockade unless it is effective, and the necessity of having an air fleet to cut off access to beleaguered cities would be a new reason for equipping ships of war with aëroplanes. Mr. Leech favors the view that that portion of the atmosphere which is within the range of artillery situated upon the ground should be regarded as similar to the territorial waters of the state and subject to the servitude of innocent passage of air-ships of all nations, while aërial heights beyond the reach of artillery should be regarded like the high seas and free alike to air-ships of all nations. The difficulty in the application of this view is that when the aviator soars so high as to be beyond the reach of artillery, the air would be too thin for him to breathe, to say nothing of the intense cold of the upper heights.

Upon the general subject of the law of the air, the most complete work in English is one so entitled by Dr. Hazeltine, of the University of Cambridge, published in 1911. In regard to the right of ownership of landowners *usque ad coelum*, while admitting that various *dicta* would indicate that this right exists, he concludes that the actual decisions of the courts go no further than to hold that the land owner has a proprietary right in the lower stratum of the air-space, a violation of this proprietary right giving the landowner the action of trespass (p. 69). He attaches considerable importance to the suggestion of Sir Frederick Pollock, already mentioned, that the scope of possible trespass might be limited by that of effective possession, and that as regards the air-space above this stratum effectively possessed, the remedy of the land-owner might well be nuisance rather than trespass (p. 73). In regard to the foreign law, he notes that the German Civil Code and the Civil Code of Switzerland do not allow the landowner to object to acts which he has no interest in preventing (p. 77). As to the liability of an aëronaut for acts producing damage without negligence on his part, he favors the doctrine of absolute liability just as in case of keeping wild animals (p. 84). This was the doctrine upheld by Dr. Sarfatti at the Verona Congress and adopted by Governor Baldwin (p. 86). Dr. Hazeltine opposes the use of the atmosphere over neutral states for the passage of belligerent aërial craft in order to reach the air-space beyond,

applying the same principle as in case of the marching of troops (p. 139), a doctrine for which there is certainly a great deal to be said, although, as we shall see, it is contrary to the views of M. Fauchille.

Turning now to authorities in German, one of the earliest treatises, or perhaps I should say pamphlets, upon this subject is entitled *Das Luftschiff im internen Recht und Völkerrecht* by Dr. F. Meili, a professor in the University of Zurich and a member of the Institute of International Law, published at Zurich in 1908. He tells us that on July 1, 1908, one of Count Zeppelin's dirigible air-ships appeared in the atmosphere of Zurich and in fact in the immediate neighborhood of the author's house. This interesting stranger "lone wandering but not lost" made an appeal to his juristic conscience so that he straightway undertook to find a place for the air-ship in the law. He thereupon enters upon a discussion of the relation of the airship to the state, its position in private law, and even discusses the matter of procedure and the criminal law as applicable to such craft, concluding with a chapter from the standpoint of international law in which he contends for the position of the freedom of the air, limited by the necessity of protection for the underlying state. As an appendix to this work is printed the project of M. Fauchille, the versatile editor of the *Revue Générale de Droit International Public*, for the judicial regulation of air-ships, which was presented by this distinguished publicist to the Institute of International Law, of which he is a member, and will be found in the proceedings of that eminent body in Volume 19, at page 19. This project is both interesting and ingenious, although it may be considered to some extent in advance of the times, as for example, in Article 18 in which he provides what shall be the nationality of children born on board an air-ship. Dr. Meili is in hearty accord with the conclusion of the Institute of International Law in its session in Ghent in 1906, *Annuaire*, Volume 21, pages 327-329, in its first article where it is stated: "The air is free. States have over it in time of peace and in time of war only such rights as are necessary for their protection."¹

(The later draft by M. Paul Fauchille of an international convention upon the legal regulation of air-ships in sixty-three articles will be found

¹ Text of the project printed in Supplement to this JOURNAL, p. 147.

contained in the second volume of the *Revue Juridique Internationale de la Locomotion Aérienne* at page 206).²

Professor Zitelmann's article upon "Luftschiffahrtrecht" will be found in the 19th volume of the *Zeitschrift für Internationales Privat- und Öffentliches Recht*, at page 458 (1909), and was an address delivered before the international air-ship exposition at Frankfort. This contains one of the most powerful arguments in favor of the view of the absolute sovereignty of the state over the air space within its frontiers. After reviewing the previous literature on the subject, in which he calls attention, among other things, to the novel work of a Dalmatian lawyer, Pappafava, upon the powers of a notary upon the land, upon the water and in the air, published in 1901, Zitelmann points out the distinction between the air and the space which the air occupies and that it is only the latter which we have to consider. This is fundamental, for while a state cannot control the air, it can from below dominate the space in which the air exists. He shows the impossibility of making any horizontal division of the air for purposes of navigation and that the concern of jurisprudence is only with so much of space as is subject to the use of man. He maintains that the air is free only over unoccupied territory and over the open sea. He says:

It is most to be desired that in its future international dealings the German Empire should place itself with entire decision upon this standpoint, which is the only one that permits it to remain master in its own house and to provide for its own safety as it shall think right.

The argument bases itself upon the property rights of the landowner both above and below the surface. Since the state recognizes the rights of the private owner above the surface, it must have complete sovereignty to protect them. He holds that it is impossible to conceive that a battle in the air should be permissible above neutral territory, on account of the dangers to the neutral state. A state has a complete right to exclude aliens. From the principle of full sovereignty over the air he solves the various cases of international private law or conflict of laws which would arise in case of air-ships. For legal purposes he brings the aviator down to the ground. So far as private law is con-

² Printed in Supplement to this JOURNAL, p. 148.

cerned, his opinion is that established principles can easily be extended to cover any cases likely to arise. He advises hesitation in applying to aerial navigation the principles of the law of the sea rather than those of the ordinary law of the country. He, however, does not allow to the owner of land the right to forbid the passage of air-ships at a reasonable height. Where an aviator is compelled by necessity to make a landing, he should bear all the resulting expense, otherwise he thinks an aviator should not be liable for damages except for negligence, with an exception in case where he does an act which he is bound to know is likely to produce injury, such as, for example, emptying ballast. He quotes the proud proverb of Bremen, "It is necessary to navigate, it is not necessary to live." He would not hold the aviator liable for injuries done to land for which he is in no wise to be blamed or in case of injuries due to accident, and does not agree to the proposition that the aviator should be liable to the owner of a piece of land upon which he has not alighted because of the damage done by curious crowds in running to his landing place. If a man is to be liable for drawing a crowd, no famous person dare show himself in the street.

Reference should also be made to the article by Dr. Grünwald upon the air-space in its legal relation to the parts of the earth underneath, in 24 *Archiv für Öffentliches Recht*, 190 (1909), supporting the doctrine of the sovereignty of the underlying state, but excepting the right of innocent passage in favor of air-ships.

The new Swiss Civil Code is the only one which has been promulgated since the discovery of aviation, and it is interesting to note that by Article 667 the property of a landowner above and below the soil is confined to the limits within which he has an interest in its use. This principle already existed in the Civil Code of the Canton of the Grisons, Article 185 dating from 1862. It is said that the limitation in the Swiss Code had nothing to do with aerial navigation.

In regard to the French literature upon the subject, which is very copious, let it suffice to cite the elaborate article by M. Paul Fauchille entitled "Le Domaine Aérien et le Régime Juridique des Aérostats," in 8 *Rev. Gén. de Droit Int. Pub.*, 414 (1901). I call your attention to the early date. This treatise might be called the opening gun in this battle of books. I think it is fair to say that the views of no one else have

as yet met with such wide acceptance as those of M. Fauchille, and even where one cannot agree with them, it is impossible not to admire their ingenuity. In 1912 there appeared a short treatise by M. Edouard d'Hooghe, honorary president of the *Comité Juridique International de l'Aviation*, entitled *Droit Aérien*, which contains, after some discussion of the general subject, a commentary on the French *Decret* of November 21, 1911, and gives an account of the Prussian ordinance in relation to aviation, and calls attention to proposed statutes upon the subject in California, Pennsylvania and New York.

At the session of the Institute of International Law at Madrid in April, 1911, there was an interesting discussion upon the law of aviation. (*Rev. Gén. Dr. Int. Pub.*, Vol. 18, p. 628). The time was found too limited to discuss M. Fauchille's project of 63 articles covering the regulation of air-ships in time of peace, in time of war, of captive balloons and of balloons without passengers. Certain principles, however, were discussed and voted upon by the members. With only two dissenting votes, the Institute decided that a distinction should be made between public air-ships and private air-ships, and upon a like vote that each air-ship should have a nationality. The Institute also voted that the nationality of the air-ship should be that of the state where it is registered, and also that each state should decide for itself upon what conditions it will grant, suspend or withdraw registration. It was also agreed without objection that special indications are necessary by which the nationality of air-ships may be recognized. The Institute voted in favor of the principle of liberty of international aerial navigation, reserving the right of states underneath to take the measures necessary for the proper security of themselves and of the persons and property of their inhabitants.

The matter of citizens of one country registering their air-ships in another, led, after considerable discussion, to the adoption of a resolution that a state which permits the registry of an air-ship belonging to a citizen of a foreign state ought not to assume to protect the air-ship within the territory of the state of its owner against the application of laws of such foreign state forbidding its citizens to register their air-ships in other states.

The question of the use of air-ships in war evoked serious differences

of opinion, first, whether their use should be prohibited altogether, and, secondly, if used in war, what limitations, if any, should be placed upon their action. Holland opposed their use in any hostile enterprise; Westlake, Fiore and Albéric Rolin opposed the throwing of projectiles from the air and pointed out the great expense of keeping air fleets in addition to the heavy burdens already borne by European states for armament. Von Bar pointed out the unfairness of allowing air-ships to be fired upon and yet not permitting them to defend themselves in the only way possible.

The final conclusion was that aërial warfare should be permitted, but upon the condition of not creating greater dangers for persons and property not engaged in war than in case of war upon land or the sea. The text of the resolutions adopted will be found in the *Annuaire de l'Institut de Droit International*, t. XXIV (1911), p. 346. The debate upon the subject is said to have been so warm that the learned members of the Institute actually held night sessions — something hitherto unheard of.

This April session, 1911, was not the first occasion upon which the Institute of International Law voted in favor of the proposition that international aërial navigation is free, subject to the right of the underlying states of fixing certain limits for its exercise in view of their own security and that of the persons and property of their inhabitants. At its earlier meeting in Ghent in 1906, having before it the question of aviation and of wireless telegraphy, Westlake contended for the position that the state has a right of sovereignty over the space above its soil, subject to a right of innocent passage for balloons or other machines of aviation, or for wireless telegraphy. He claimed that the right of sovereignty should be the rule and the right of passage the exception, and suggested the analogy of territorial waters. (21 *Annuaire*, 298). The resolution adopted by the Institute, however, was that the air is free and that states have no rights over it in time of peace or in time of war except such as are necessary for their protection. (21 *Annuaire*, 327).

In spite of Westlake's failure to carry the Institute with him, the view which he advocated is so admirable in its analogy to existing law, so suitable for the necessary protection of states, yet without giving

up the fundamental right of peaceful navigation of the air — to surrender which might almost be called treason to humanity — his views have received the approval of numerous subsequent authors, and it is not impossible that they may ultimately prevail.

When the legislator comes to enact his Code of the Air, he will find much of his work already done for him in the draft of an international code prepared under the auspices of the International Juridical Committee on Aviation, which has already held two international congresses for this purpose, the earlier at Paris in 1911 and the later at Geneva in 1912. This committee has published the *Revue Juridique Internationale de la Locomotion Aérienne*, which has reached its third volume and contains in addition to the reports of the national subcommittees and the discussions in the preparation of the draft, current news of the jurisprudence of aviation and articles dealing with the legal questions to which the conquest of the air has given rise. The proceedings of the two congresses are also published separately. The organization of this committee was made under the auspices of the Aéro Clubs of the different countries, and the work which has been done is not only interesting, but will prove of undoubted value in the legislation which the progress of aerial navigation will inevitably require. Attention should also be called to the international congress upon the same subject at Verona in 1910, attended principally by Italian jurists, in which the congress resolved in favor of the doctrine of sovereignty over the air by the underlying states, tempered by the doctrine of the right of innocent passage of air-ships. It is not necessary to commit the states to any particular theory of sovereignty over the air in order for them to accomplish wholesome and useful laws, whether enacted by the several legislatures or embodied in international treaties.

In the early discussions of the draft of a Code of the Air, the view suggested by a majority of the German subcommittee of the *Comité Juridique International de l'Aviation* was that the space above the territory of the state, including its territorial waters, should be regarded as a part of the territory of the state, but that no state should in time of peace forbid the innocent passage of foreign air-ships, and that acts done upon a foreign air-ship while in the air which do not affect the interests of the underlying state should be subject to the legal jurisdiction of the state.

tion of the state to which the air-ship belongs. This view was rejected by the *Comité* as a whole in favor of the view that the navigation of the air is free and that underlying states have only the rights necessary to protect their own security and the exercise of private rights within their territory, and that of their territorial waters.

The position that the state is sovereign of the overlying space, advanced by the German committee was supported by the Austrian and Danish members, while the French project in favor of the freedom of the air was supported by the representatives of Belgium, Italy, Monaco, Turkey and the United States. The final decision reached was in favor of the position that aerial navigation is free and that states do not have over the space above their territory, including that over their territorial waters, other rights than those necessary to guarantee the national security and the exercise of private rights.

In the discussion of the German project, M. Paul Fauchille (*1 Revue Juridique Internationale de la Locomotion Aérienne*, 135) said that if it was necessary to decide upon the legal nature of the aerial space, one would have to choose the freedom of the air with a reservation of the rights of the underlying states for their protection, and not the sovereignty of the underlying states moderated by the right of innocent passage of air-ships. The first theory, he said, is the only one which truly assures aerial navigation without injuring on this account the legitimate interests of the states. With the second, a state would be able if it chose to close its atmosphere to the navigation of air-ships; the right of innocent passage, which in fact is acknowledged to them, accords very ill with the idea of sovereignty. In truth, either the state is sovereign or it is not — it is not half sovereign. Besides, what are we to understand by innocent passage? Nothing is more vague. This state would consider as innocent a passage which another would judge to be dangerous. In addition, the air by its very nature does not appear to be susceptible to sovereignty. Finally, with the German theory which admits the sovereignty of the state over space as a necessary consequence of the sovereignty of the state over its territory, the result would be in time of war an inadmissible conclusion; since the air constitutes a necessary dependence of the land territory, the conclusion would follow that the air of a neutral state would be closed, not only

to the acts of hostility of belligerent air-ships, but even to their simple passage; the result would be that the states which have no communication with each other except by way of the air of a neutral state would not be able to reach each other's atmospheres or to return to their own, in order to fight. Aërial war would be impossible for them, and this would result in putting certain states at a disadvantage as compared with others, which is not admissible.

M. Fauchille seems to have abandoned entirely his earlier idea of fixing a zone in the air corresponding to the three-mile limit in territorial waters beyond which navigation should be absolutely free. A fundamental point in his theory is that the air is incapable of appropriation in any real and permanent fashion. An aviator can no more be at rest in the air than can a bicyclist moving upon a highway. To remain in one place it is necessary to dismount, except in case of a captive balloon. He regards the air, like the high seas, as a subject of common right in which many states may exercise their rights at the same time. The only limitation to the principle of freedom he draws from the right of each state to protect itself. His first report upon the subject will be found in 19 *Annuaire de l'Institut de Droit International*, at page 19, in which the various articles which he propounds are discussed with some elaboration. In the same volume, at page 86, will be found the report of M. Nys upon the subject and in favor of an even more liberal freedom of the air.

The essential difference between the high seas and the upper air was early pointed out by Westlake to be that the further off a vessel goes from the land, the less danger it becomes to the territory of the state, while in case of an air-ship, the higher it goes the greater the danger to the underlying state on account of the possible fall of objects from the air-ship or of the ship itself.

A more recent expression of M. Fauchille's views will be found in the *Annuaire de l'Institut de Droit International*, Vol. 23 for 1910, at page 297, and at the close of his report is given his project of a convention in relation to aërial navigation followed by a shorter project of Vor Bar.

Probably the most exhaustive work in English upon the subject is *Air Sovereignty*, by Dr. J. F. Lycklama, a translation of a work which ap-

peared first in French in a series of articles in the first volume of the *Revue Juridique Internationale de la Locomotion Aérienne*, a work which not only gives the author's argument and conclusions, which are in favor of the unlimited sovereignty of the state over the air, but also collects the material showing the laws of various foreign states, from which analogies may be drawn.

One of the most complete works upon the general subject of aërial law is that of Professor Enrico Catellani, of the University of Padua, entitled *Il Diritto Aereo*, translated into the French by M. Bouteloup under the title *Le Droit Aérien*, published in Italian in 1911 and in French in 1912. The author has carefully examined the literature of the topic, the material contained in the discussions of the Institute of International Law, and the work of the *Comité Juridique International de l'Aviation*, beginning in 1909, in connection with drafting a Code of the Air, and also the communications from the various governments preliminary to the international conference upon aërial navigation, held in Paris, as well as the proceedings of the unofficial congresses held at Verona and elsewhere upon the subject of aërial navigation, so that the book contains an admirable survey of the data extant upon the subject.

Upon the question of sovereignty over the air, Catellani would concede to the underlying state rights of sovereignty, but only so far as its interests require, following the analogy of the property owner under the most modern legislation in which his rights overhead are limited to such as he has an interest in exercising. He holds that the state ought to be able to forbid at any height in the space which dominates its territory whatever menaces its security or restrains its sovereignty or compromises in any manner whatever its use of its territory; but, on the other hand, the aërial space ought to be completely free from any dependence upon the subjacent state in that which concerns the use and especially the passage of the air in every case where such use and passage do not have the objectionable consequences indicated to the underlying state.

He points out the interesting fact that Selden in his *Mare Clausum* argues the right of exclusive dominion over the high seas from the right of exclusive dominion over the air, saying that the sea is no more fluid

than the air. Catellani shows that in the Roman law the ownership of the soil did not extend to the heavens, such an idea being contrary to the practical spirit of the Roman law, and he regards the air as a thing common to all, of which everyone is entitled to the use. The most modern civil codes refuse to allow the right of ownership to extend beyond the limits within which the owner of the soil has a real interest in its use, and such is also the tendency of the decisions of the courts. The same analogy should be followed as to the rights of sovereignty of the underlying state. So far as the state has no interest to preserve in the protection of its territorial rights, it should consider the aërial space as non-territorial. He suggests that in every part of the overlying space the state has full right of sovereignty for its protection and for the preservation of its interests, but at the same time that in all aërial space all men are entitled to the enjoyment of a common right of navigation. These two rights coexist throughout, the right of the state indeed only in the superjacent air, but the common right of humanity in the atmosphere everywhere. He emphasizes the necessity of international legislation along the lines of the proposed Code of the Air, embodied in statutes which are not framed simply from the local point of view, but from the standpoint of international benefit.

Upon the question of the liability of the aviator in case of accident free from negligence, he calls attention to the conclusion of the Congress of Verona, that responsibility ought to be limited to cases of negligence, as a more stringent rule would prove a handicap to the development of aviation. The interesting suggestion is made that for the regulation of aërial navigation, a body of international police will ultimately become necessary. The wreck of air-ships will call for peculiar provisions in order to protect the rights of the owner. He mentions negotiations begun upon the initiative of Mexico for a treaty of aviation between Mexico, the United States and Canada. I am informed by the Secretary of State, however, that nothing has been done towards an agreement on this subject.

In case of crimes committed in the air, where the acts produce an effect in the underlying state, that state should have jurisdiction, while in case of acts in which the underlying state has no interest, the situation should be treated like similar acts upon the high seas.

At this time it would be premature to lay down rules for the international law of war, but the author believes that the civilized states should unite in laying down uniform regulations upon this subject. The rules applicable to international aviation should not only be uniform but should also have the collective sanction of all the states.

The author ridicules the idea of an aërial invasion commenced by the transportation in several hours of an army corps by means of aëroplanes as an episode worthy only of a fantastic romance.

He has not, like Tennyson,

Heard the heavens fill with shouting, and there rained a ghastly dew
From the nation's airy navies grappling in the central blue,
Far along the world-wide whisper of the South-wind rushing warm,
With the standards of the peoples plunging through the thunder storm.

At the second juridical conference on aërial navigation, held at Geneva the 28th and 29th of May, 1912, five new articles of the proposed Code of the Air were agreed upon, to the effect that an aéronaut on the high seas, or above land not belonging to any state, should be governed by the laws of his nationality; that when above a foreign state, acts on board the ship which are of a nature to compromise the security or public order of the underlying state should be governed by the legislation and subject to the tribunals of that state; that the liability for damage caused to persons or property in the underlying state should be governed by the law of that state, and that actions therefor may be brought either in its tribunals or in those of the nationality of the aéronaut; but that transactions in the air which are not of interest from the point of view of the security or public order of the underlying state remain subject to the jurisdiction of the nation to which the aéronaut belongs. Births or deaths upon an aërial voyage are to be put in the log of the vessel and communicated, at the first locality where the aéronaut lands, to the nearest national or consular authority of the nation to which the aéronaut belongs.

At the meeting of the International Law Association in Paris on May 29, 1912, there was an interesting discussion upon the subject of the jurisprudence of the air. Papers were read upon the liberty of the air and upon wrecks of air-ships. M. Fauchille read a paper in regard to

the International Judicial Committee on Aërial Navigation, calling attention to the labors of this body in the production of their draft Code of the Air, which is to embrace public law, private law, including commercial law, administrative law, taxation and penal law. Such elaborate provisions seem to us in America premature, but possibly this is due to the backward state of the art of aviation amongst us as compared with some other nations. M. Fauchille took occasion to set forth his doctrine that the principle of the liberty of the air is the only one favorable to the expansion of aërial navigation and that this right should not be abandoned to the good will of states. He recognizes among the restrictions necessary for the protection of the subjacent state the right to prevent flight above certain regions, such as fortified places and cities, the right to require them to take out a license and to have proper skill, to forbid the passage of aërial ships of war or foreign forces in the air, to exercise rights of police and superintendence over aéronauts while in the air, to subject them to its tribunals where damage is caused to its territory or to persons upon its soil by reason of the acts of those in air-ships. M. Fauchille submitted seventeen articles already recommended by the committee in regard to public law covering the right of navigation, the nationality of vessels and the registration of aéronauts, the matters of alighting, of throwing things from air-ships and of wrecks. The most interesting of these is the first article, which provides that aërial navigation is free, saving to the subjacent states the right to take measures on behalf of their own security and that of the persons and property of their inhabitants. In the discussion of this paper which followed, an Austrian delegate declared himself in favor of the German theory of the sovereignty of the state over the air, but subject to an international servitude of free passage. A paper was also read by Mr. Hazeltine, a reader in English law at Cambridge, upon the subject of state sovereignty in the air-space, taking the same position as in his volume on *The Law of the Air*, that the control of a state over the air-space above is absolute.

The session reached no final conclusion upon the subject, but appointed a commission to prepare a report upon the whole matter for their meeting at Madrid this year (1913).

While, as shown by the discussions in the Institute of International Law, the Continental jurists for the most part favor the doctrine of the

freedom of the air, limited only by the security of the underlying states, one has only to turn to the treatise on *Air Sovereignty* by Dr. J. F. Lycklama to find this position denied *in toto*. After an examination of the various Continental codes and many of the decisions of Continental courts, the author comes out squarely for the position of the unlimited sovereignty of the states over the air above them. This author points out the difficulty of drawing any dividing line between the upper and lower levels of the atmosphere, and alludes to the fact that the improvements in the art of artillery are such that to concede to the underlying state the rights of sovereignty within the range of its guns would practically result in turning over to the sovereignty of the underlying state the entire realm of the atmosphere in which aviation is practicable.

The English position seems to be that the state has unlimited sovereignty over the air above its soil. This position is very clearly taken in Hazeltine's *Law of the Air*, and in February of this year the passage of foreign air-ships over certain areas of England was forbidden altogether. A certain nervousness has also been exhibited by the Russians, and complaints have been made of their firing upon German air-ships which had not crossed the Russian border. The German military air fleet is believed to have a greater predominance over the fighting air craft of other countries than the English navy has over their navies, and the prospect of foreign vessels exploring the atmosphere of England and testing out by experiment the possibility to carry on serious operations there is enough to disturb the equanimity of an Englishman and also to point out the necessity of allowing to each state, for the purpose of its defense, all necessary control of the atmosphere overhead both in peace and in war. It would be preposterous to suppose that England would be bound by the rules of international law to submit to unregulated cruises of air-ships above its territory, something likely to result in enormous mischief to the country in times of war, since the long journeys already made by the Zeppelin ships demonstrate only too clearly their ability to become formidable engines of war.

On the other hand, in dealing with the question of the actual power of the state over the air, it should be borne in mind that a height is soon reached at which the air becomes no longer suitable for respiration or for the maneuvers of the flying craft, and that with the present progress of

artillery intended for use in firing upon air-ships, it is practically possible for a state to exercise authority over the atmosphere above its soil so far as it is available for aviation. It is conceded by all that the right of aerial navigation is unlimited so far as the air over the high seas is concerned, and the same principle should undoubtedly be applicable to air above maritime highways, which are open to the ships of all nations. To compel air vessels, however, to follow the devious paths of the seas would be to lose one of the principal advantages of the use of the air, which lends itself to a much greater extent than the sea to journeys upon a direct line. It substitutes an air line for a water route between two points. The air over territorial waters might perhaps be conceded to be subject to the sovereignty of the state to the same extent as the territorial waters themselves. In such air, as in the territorial waters, there would exist the right of innocent free passage for the ships of all nations, with the exception of vessels of war when the state chooses to exclude them. But it is a necessary consequence of the doctrine that the state has absolute control of the air within its borders for every purpose, that it may refuse to permit the passage of flying craft even for the most innocent purpose, and it is conceivable that in this manner such a country as, for example, Switzerland or Servia, could be deprived absolutely of access through the air. This is following the swing of the pendulum too far, and it would be unfortunate to seek repose in such a conclusion.

The maxim that "he who owns the earth owns it to the Heavens" is no more worthy of respect than the other maxim that the "air is free to all," and the expression "free as the air" certainly would have very little significance if persons were not allowed to go about in it. It seems impossible to divide the air into zones below a certain height to belong to the underlying state, and above a certain height to be free for purposes of innocent navigation, and while the safety of the state should receive every possible protection against spying, smuggling, violation of quarantine, the entry of criminals, and the like, since the normal state of nations is peace and not war, it ought not to be possible for a state to put an end absolutely to all kinds of aerial navigation over its frontiers. The right of the state to protect itself ought to be limited by the reasonable necessity of protection, and a general interdict on the passage of flying

machines over the soil ought not to meet with the approval of international jurists anywhere.

When some future William Tell shall address the storms of his native land: "Blow! Ye are the winds of liberty," I hope no jurist will be found to answer, "On the contrary, William, these are the winds of Switzerland, and any foreigner riding on the gale will be sentenced to six months imprisonment at hard labor."

The air-ship offers a new facility not only for the evasion of the customs and quarantine laws of the states, but for the introduction of undesired aliens. It is related that when the first aviator safely alighted upon the English shore, he was shortly waited upon by the customs officers of the realm inquiring if he had anything to declare, and while this incident created some humor at the time, it will obviously become necessary when air fleets are common. Indeed, according to the newspapers, at Luneville last April, France collected the sum of \$2,000 customs charges from a German military air-ship which descended in its territory. This is, of course, one way of conveying a delicate intimation that visitors are not expected. If a sea-going vessel by stress of weather or losing its way in a fog should come into a French harbor or upon the French coast, the skipper would certainly not expect to pay tariff charges for having imported the vessel. It seems rather a case of imposing a fine.

If we accept the theory of the absolute sovereignty of the state over the air, grave consequences are likely to follow to neutral states in case of war, for it will probably then be their duty to prevent the passage of air-ships of war belonging to belligerent nations and to prevent the use of the overlying atmosphere for the aid or benefit of either of the warring states. One can readily see that this would be a matter of the greatest difficulty. An unpleasant consequence in times of peace would be that states would be able to grant monopolies of aerial navigation, which might revive unpleasant memories of the commercial claims of certain maritime Powers over the seas three centuries ago.

The conference of the Powers upon the subject of aerial navigation in April, 1910, at Paris, which adjourned without result after several months' deliberation, is said by Sir Erle Richards to have shown such a radical and irreconcilable difference of opinion upon the question of the sovereignty of the state over the air as to make progress impossible.

While such reasoning as his might be very acceptable to island states like Great Britain, it must be obvious that to a country like, for example, Bolivia, surrounded entirely by other states, which could by the application of this doctrine be cut off from any through lines of aerial traffic altogether, it would be far from acceptable. If, as seems not unlikely, air-ships should ever cross the ocean, such a doctrine might prevent an air-ship from passing over the British Isles at all and make an air line as devious as a route by sea. The great objection to extending the right of private ownership into the air is that, as a practical matter, the land-owner has no dominion over the higher levels and never can have. The essential idea of property is dominion, and human rights should not even in theory extend beyond human power. In the same way, the dominion of the state can never actually be exercised over the entire air lying above it, and it seems a vain project for a state of any size to interdict altogether the passage of air-ships. After the full right of a state to protect itself and its subjects has been conceded, there remains something to be said for the principle of discarding all unnecessary limitations of human freedom and allowing the common enjoyment and use of the air. The great interests of mankind lie in the direction of peace, not war. After the necessary safeguards have been taken for the protection of the safety of states, we should look rather to the enlargement of human freedom and human intercourse, and these matters are too precious to be left to the absolute discretion of each particular state. It can hardly be imagined that a state could seriously undertake to police its entire aerial frontier so as to prevent the passage of air vessels. Not the frontiers alone, but the entire atmosphere of the country, would have to be patrolled. It would be just as easy to maintain a blockade of an entire nation in three dimensions, and it seems of little use to concede to a nation in theory a dominion which can never be possible in fact. The difficulty of the situation may perhaps be illustrated by trying with a rifle to shoot a bird upon the fly at night.

We cannot help believing that the military point of view is the prevailing one with the German as well as the English jurists who have accepted the doctrine of absolute sovereignty, and the result reached is certainly one which, however desirable in times of war, must bid us pause in times of peace. Both the doctrine of the absolute sovereignty

of the air and the doctrine of the absolute freedom of the air lead to undesirable, not to say, impossible conclusions, and if a middle ground can be found which will enable states to take all measures necessary for their own security and yet, subject to this restriction, permit the full advantage of the new discovery in the way of extending human intercourse, and increasing the opportunities of travel and trade, it is very desirable. On one side we have the intense nationality and martial spirit of the single state, and on the other the spirit which would break down all artificial and unnecessary boundaries between nations and extend the citizenship of the world, the spirit which, cherishing no vast dreams of exclusive empire, looks forward rather

Till the war drum throbs no longer and the battle flags are furled
In the Parliament of man, the Federation of the world.

The theory of sovereignty over the air, it seems to me, rests upon the facts, first, that by means of suitable cannon the underlying state is able by physical force to control to a great extent the use of the air just as in case of territorial waters; and, secondly, that the danger of injury from foreign vessels moving, or, for example, engaging in combat, in the air, is fully as great as that in the case of territorial waters. So long as the right of innocent passage is preserved to private air-ships of other nations under reasonable regulations for the protection of the underlying state, they have no real grievance, but if a nation should lie across an international air route and absolutely forbid the right of innocent passage, the grievance might become in future just as great as if such a state should undertake to close that portion of its territorial waters which constitutes a marine highway.

It is difficult to justify the right of the underlying state to police the air, except upon the theory that it has jurisdiction over it. This is not inconsistent with the view of a servitude of innocent passage in the air of the same kind as in territorial waters. This servitude is to be supported upon the theory that by common usage and for reasons of public policy innocent passage is permitted. From the time of the invention of the balloon, such vessels have passed over the territory of various states without objection, and it would be surprising to find that the matter gave rise to any serious question before balloons became dirigible and

popular fears were excited by possible dangers arising from their use for purposes of espionage or in war. It is true that, for the purpose of observation of fortifications and photographing them, the air-ship offers extraordinary opportunities, and it may also be used for the discovery of submarine mines laid for coast defense and not visible from the surface of the water. On the other hand, it is almost impossible that it should not be discovered in the work of espionage.

The failure of the international conference of 1910 at Paris was said to have been on account of the attitude of certain Powers, including Great Britain, which desired to preserve the right to close their frontiers absolutely to air-ships of any nationality or all nationalities whenever it pleased them without the necessity of having to justify their conduct in so doing. The English Aërial Navigation Act of 1911 (L. R. Gen. St. 1911, c. 4, p. 14) confers upon a Secretary of State, for the purpose of public protection, the right from time to time to issue orders prohibiting the navigation of air-ships above territory named in the order and during the time therein stated, and the order may be for air-ships in general or for the kind of air-ships described therein, and any person violating the Act is made subject to imprisonment for six months or a fine of 200 pounds, or both. The prohibition may be temporary or permanent.

In the Associated Press dispatches of March 4, 1913, it is stated:

Under authority conferred by the aërial navigation act, the home secretary has issued orders prohibiting foreign military or naval air craft from passing over any portion of the United Kingdom or territorial waters except on invitation and by permission of the government.

All other foreign air craft coming to the United Kingdom are required first to obtain clearance papers from the British consuls. Landings will be restricted to certain areas of the coast, where the air pilots must report to the authorities and obtain a permit for the continuance of the voyage. They are prohibited from passing over certain districts in which are included the military and naval stations.

Anyone infringing the regulations, it is announced, is liable to be fired on, and the offense is punishable by six months' imprisonment or a fine of \$1,000. Aéronauts guilty of espionage are liable to seven years' penal servitude.

If these orders are correctly stated, they might be sustained, not only upon the theory of the absolute sovereignty of the air, but also upon the theory that the regulations are restrictions for the proper policing of

innocent passage, while the right to exclude military or naval air craft would be everywhere conceded. The action of the British authorities would of course not necessarily express the rule which will ultimately be established in international law.

A memorandum of the rules promulgated under the English Aërial Navigation Act of 1911 will also be found in the New York *Nation*, Volume 96, No. 2491, p. 302, issue of March 27, 1913. The concluding comment of the editor is "No foreigner yet heard of would be brave enough to run the gauntlet of these regulations." At least they produce the impression that England is not at home to callers by air. The most reasonable prospect for the amelioration of severe rules lies in the discovery of a way to make international aerial navigation commercially profitable. I have more hope in the activities of an enterprising air-ship company than in a declaration of the rights of man.

The progress of legislation over the air goes on in various countries. As early as March 12, 1909, the French Minister of the Interior issued a circular to local officials prescribing the action to be taken in case of the landing of foreign balloons within their respective territorial divisions.

According to press dispatches of May 10, 1913, important new legislation has been approved by the French Cabinet, and is to be brought before the Chamber of Deputies.

In foreign countries the practice is coming in vogue of forbidding the passage of air craft over a city at a time when crowds will be gathered there, as in case of a royal visit or a public procession.

The earliest American "Act concerning the registration, numbering and use of air-ships and the licensing of operators thereof" was the Connecticut statute drafted by Governor Baldwin and approved June 8, 1911 (Conn. Pub. Acts, 1911, p. 1348). It forbids under penalty of fine or imprisonment, or both, aviation from one point within the State to another except by licensed operators, requires registration of each air-ship, the carriage of the registration certificate, and a display of its number in figures not less than three feet in height, provides for examination for license, but for the recognition of licenses already issued by competent societies, and for the revocation of licenses, and allows non-residents licensed and having air-ships registered in the states where

they reside to fly ten days in a year in Connecticut without a license. The liability clause (Sec. 11) is as follows:

Every aéronaut shall be responsible for all damages suffered in this State by any person from injuries caused by any voyage in an air-ship directed by such aéronaut; and if he be the agent or employee of another in making such voyage his principal or employer shall be responsible for such damage.

When aéroplanes become as plentiful as blackberries, Connecticut will be found prepared. Upon the questions whether an aerial robber is a pirate, and whether an air-ship falls within the admiralty and maritime jurisdiction of the United States, the statute naturally gives us no light.

By the Massachusetts Act of May 17, 1913, to regulate the use of air craft, provision is made for the license of aviators upon satisfactory examination and after registration. The duty is imposed of showing the registered number in numerals not less than two feet high. Rules of the air are prescribed for meeting head on, meeting obliquely, and overtaking, corresponding with the marine practice. Air machines are forbidden to fly over municipalities except at prescribed altitudes, or to fly over crowds of people. An aviator is held liable for injury resulting from his flying, unless he can demonstrate that he has taken every reasonable precaution to prevent such injury.

Throwing or dropping missiles without special permission is forbidden, as is also landing upon public property without permission.

The Act does not apply to military aviators while in service. Licenses of other States are recognized for a period not exceeding ten consecutive days. Violation of the Act is punishable by fine of not more than five hundred dollars and imprisonment not more than six months, or both.

There appear to be very few cases in English or American books upon the liability of aviators.

In the celebrated case of *Guille v. Swan*, 19 John (N. Y.) 381 (1822), Guille descended into Swan's garden, his body hanging out of the ear of the balloon in a very perilous situation, and called for help. The balloon as it descended dragged over potatoes and radishes about thirty feet before Guille was taken out. About two hundred persons broke into Swan's garden through the fences, beating down the vegetables and flowers. Swan brought an action of trespass and the court held that

Guille was responsible for the acts of the crowd in treading down and destroying the vegetables and flowers. The court said that Guille ought to have foreseen and be responsible for what happened since it was likely to occur, and also that his perilous position and cries were equivalent to a request to the crowd to follow him.

There is a Scotch case the facts of which are much like those of *Guille v. Swan*. It is *Scott's Trustees v. Moss*, 17 Ct. of Session (4th series) 32 (1889). In this case, the defendant, who was not the aéronaut but the occupant of a recreation ground, had advertised a descent of a parachute. The descent occurred upon a farm adjoining and a crowd, which had not been in the recreation ground, rushed in and trampled a field of turnips where the parachute descended. It was held the action would lie, if the occurrence was the natural and probable result of the defendant's acts.

In the *Green Bag* for August 1911 (Vol. 23, p. 398), will be found a translation of a short but very interesting article by Professor Hans Sperl setting forth the prevailing theory in Germany that the state is unrestrained sovereign over the air above, but accepting in the main the analogy of territorial waters, and supporting the absolute liability of aviators for all damage caused by them, without regard to negligence. I make the following quotation from this article:

A very remarkable case was brought up in the Belgian Chamber of Deputies in June, 1909, by the Minister of Justice, Lantsheere. Near a small town a balloon began to collapse from loss of gas. The pilot, seeing himself forced to land, chose for himself an open space beyond the town. As he flew just above the roofs of the houses, with his ropes dragging in the streets, the inhabitants, supposing he wished to be drawn down, seized the ropes. The aéronaut cried to them to release him; his cries were not understood, were assumed to be cries for help, and the townsmen pulled the balloon to the earth. The pilot was forced to open his valve to release the gas. In the second story of a house in the narrow street a man was smoking; his cigarette ignited the escaping gas, and there was an explosion, with dead, wounded and destruction of property. The court compelled the aéronaut to pay all damages, because he was held responsible for the accident.

It is not unlikely that when the art of aviation is perfected, and air craft become a familiar sight, we shall cease to treat the owner of an airship as if he kept a wild animal. I do not see why aéroplanes should be

put in a different class from automobiles, whose operators exact a much heavier toll of life and limb from the public.

Since the days of Darius Green, that ill-fated pioneer in American aviation whose exploits are celebrated in the genial verse of Trowbridge, it has been well known that the chief difficulty about flying is alighting. Having for some time hovered lightly over this great subject, sustained chiefly by your good will and courteous attention, I have now the ancient trouble about terminals. I will deflate at once, hoping for better fortune than the Belgian aéronaut who suffered at the hands of his friends first an explosion and then a lawsuit.³

BLEWETT LEE.

³ To the literature mentioned in this article should be added *Essai sur la Navigation Aérienne en droit Interne et International*, by Dr. Henri Guibé, published in 1912. This work contains an admirable discussion of the various theories which have been put forward upon the subject, and the author supports the view of the sovereignty of the underlying state subject to a servitude of the innocent passage of air ships.

The following item which appears in the *London Times* (Weekly Edition) of August 1, 1913, at page 622, may also be of interest:

"A Franco-German convention has been signed with a view to regulating air traffic between the two countries. Private aircraft will be at liberty to cross the frontiers, save in districts of military importance. State aircraft may cross only on authorization of the other state. If a military aircraft is forced over the frontier by weather it is to come down at once and report to the nearest military authority. In these circumstances extra-territorial advantages will be granted to the distressed aircraft, and it may not be detained."

BASIC ELEMENTS OF DIPLOMATIC PROTECTION OF CITIZENS ABROAD *

The diplomatic protection of citizens abroad is a comparatively modern phenomenon in the evolution of the state, in constitutional and in international law. Not until the legal position of the state toward individuals, both its own citizens and aliens, and of states between themselves, had become clearly defined in modern public law, did diplomatic protection become a factor in international intercourse. A discussion of the subject therefore involves a preliminary study of three distinct legal relations, first, between the state and its own citizen; secondly, between the state and aliens resident within it; and, lastly, the relations of states among themselves with respect to their rights over and their international responsibility for delinquencies toward aliens.

The history of the legal relation between the state and individuals, its own citizens and aliens, is largely a history of the transition from the system of personal laws to the territoriality of law, accompanied both by a growing control of a central power over the individuals within its jurisdiction and by the appearance of certain characteristics, territorial independence and sovereignty, as essential qualifications for admission of a state into the society of states.¹

GROWTH OF TERRITORIALITY OF LAW

The territoriality of law, an accepted phenomenon of modern times, was a matter of slow development. The Roman law was not applicable to foreigners. Strictly speaking, the foreigner was an outlaw. Com-

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¹ The growth of the state and of modern political society can not be here discussed. The subject is ably treated by Professor Edward Jenks in his *History of Politics*, London, New York, 1900, and in his *Law and Politics in the Middle Ages*, London, 1898.

merce, custom and religion brought about an amelioration of his harsh condition to the extent of permitting the application of the foreigner's own law in legal relations among themselves and in certain commercial relations with Roman citizens. Even this privilege, however, was extended only to friendly peoples. The German tribes were more hospitable to the foreigner, although strictly he was a person without rights. By permitting the foreigner to reside among them if unchallenged by a member of the tribe, the foreigner acquired a precarious measure of protection, usually assumed by the king or leader of the tribe.²

In the commingling of tribes in the Frankish Empire and in the absence of any centralized or stable legal system or judicial organization previous to the time of Charlemagne, each tribe lived under its own law and the personal rights and acts of the individual and his legal status were regulated and judged according to the code of the tribe or nation to which he belonged.

This system of the application of the personal laws, as they were called, was by no means analogous to the privilege of living under their own law which Rome had extended to certain classes of friendly aliens. In the Frankish Empire, there was an equality between all the personal systems. In Rome, only the Roman law was universal, and its enjoyment was limited to Roman citizens alone. The use of foreign systems was a special concession due to the unwillingness of Rome to permit foreigners to share in the benefits of the Roman civil law. In the Frankish Empire, the various tribes and their members were equal; in Rome the position of the non-Roman was one of legal inferiority and such advantages as he came to enjoy consisted in the removal of restrictions imposed by the Roman law. The Germanic peoples, before their invasion of Rome, knew no system of personal laws, for it was their uni-

² Bar, L. von, *Theory and practice of private international law* (Gillespie's translation), Edinburgh, 1892, p. 12; Bernheim, A. C., *History of the law of aliens*, New York, 1885, p. 7, *et seq.*, p. 18; Frisch, Hans von, *Das Fremdenrecht*, Berlin, 1910, pp. 5-22. For the legal position of aliens in early law see the following works: Demangeat, Charles, *Histoire de la condition civile des étrangers en France dans l'ancien et dans le nouveau droit*, Paris, 1844; Sapey, C. A., *Les étrangers en France sous l'ancien et le nouveau droit*, Paris, 1843; Catellani, E., *Il diritto internazionale privato e sui recenti progressi*, Torino, 1895, 2nd ed., v. 1, p. 13 *et seq.*; Weiss, A., *Traité de droit international privé*, 2nd ed., Paris, 1908, v. 2, chap. 1.

versal custom that the law of the conquering tribe replaced that of the conquered. The master abolished the law of his slave, and substituted his own.³ The conditions arising out of the conquest of such a cultured people as the Romans changed this custom, and in the coördinate existence of the Roman system and the body of tribal systems the germ was laid for the recognition of the personality of laws.⁴ The Roman law existed side by side with that of the dominant conquering tribe.⁵

The two great exceptions to the rule of the personality of laws were in cases where the person's individual law could not be recognized and those where such recognition was contrary to public interest. The first exception applied to aliens and non-Christians, aliens being those whose nations were not included under the Empire. As we have said, aliens had no rights and were under public protection and governed by the law of their protector. An individual personal law, moreover, could not interfere with public law; so, for example, the criminal law soon became local and territorial.

In the later Middle Ages, various influences led to a transition from the principle of the personality of law to that of territoriality of law. With the development of agriculture, came a greater permanency of habitation on the part of the Germanic nations. The fixed attachment to a city or community, and intermarriage between members of the different Germanic nations, made it difficult, after a generation or two, to keep in mind individual personal laws; so that courts began to apply their own law, derived largely from the capitularies of the Emperor which applied to all within the empire without discrimination of race or na-

³ Bar, L. von., *op. cit.*, p. 18.

⁴ Continental Legal History Series, v. 1, *General survey of events, sources, persons, and movements in continental legal history*, Boston, 1912, pp. 60 *et seq.*

⁵ At the present day we may note the survival of the system of personal laws in the fact that Europeans live in various parts of the world (Turkey, India, the Malay peninsula, the Barbary States) under their own law, as do the Indians while on their reservations in this country. See also Asser-Rivier, *Eléments de droit international privé*, Paris, 1884, p. 7, footnote. In the conflict of laws there are numerous cases in which a legal relation is judged by the so-called "personal statute," either the law of the domicil or of nationality of the individual in question, though this is rather an outgrowth of the *jus gentium* of the Romans than an illustration of the modern survival of the personality of laws. See also Savigny, F. C., *A treatise on the conflict of laws*, translation of v. 8 of his *System des heutigen römischen Rechts* (1849) by William Guthrie, Edinburgh, 1880, p. 58, pp. 60-62.

tion. Although local customs continued to prevail, they applied, instead of to distinct individuals, to all those within a certain locality. The church, by its dominance in certain spheres of law, particularly the family relations, helped to substitute legal uniformity, for the diversity of personal laws. Feudalism, however, was the most vital factor in breaking down the principle of personality. With the intermingling of the races under a fixed home life, with the final acceptance of one religion to replace paganism, with the centralization of legal relations around the idea of land ownership, personal systems lost their utility. In most private legal relations one rule had become dominant over the many conflicting rules previously applied. In the field of public law the feudal fief became the unit of administration, and within it all classes of persons having identical rights in land, had identical rights and duties with respect to their lord. Within the various classes of liegemen rights were equal.

These influences ultimately brought about the disappearance of personality as the criterion of the application of law and substituted territoriality and local uniformity, notwithstanding the fact that certain groups such as the citizens of certain towns, members of certain guilds, and churchmen were accorded special privileges within the territorial limits.⁶

In the feudal system we find some of the primary elements of the relation between the state and its citizen and the protective functions of the state. Feudalism embodied the notion of the territoriality of rights with the personal relation between lord and liegeman now known under modern transformations as sovereignty. Although land ownership became an index of rights and duties, thus strengthening the territorial principle, and the oath of personal allegiance established the reciprocal obligations of protection and service between the feudal lord and his liegeman, it is to be noted that the lord's jurisdiction and control over his man did not transcend the boundaries of his fief.

NATIONALITY

The Thirty Years' War was an epoch-making event in the history of international law. It was not merely a great struggle between Protes-

⁶ *General survey of continental legal history*, pp. 80-83; Savigny, *op. cit.* pp. 63-64.

tantism and Roman Catholicism, but from it emerged the principle of territorial independence as opposed to imperialism.⁷ The international system of the present day was definitely marked out and the characteristics of the modern state defined. While unequal in power, the states in the system were recognized each as independent, as legally equal, and as exercising exclusive jurisdiction within certain definite territorial limits. The removal of the common superior fostered what had in fact for years been a sense of national independence and national consciousness. Overshadowed for a time by the religious attributes of the Reformation, and obscured by feudal particularism,⁸ nationality emerged at the Peace of Westphalia as a phenomenon distinct from religion.

The relation between the state and individuals, both its own subjects and aliens, brings up the important questions of the legal and political nature of the state and the reciprocal rights and obligations existing between it and individuals.

Citizenship (or nationality) is the status of an individual as subject or citizen in relation to a particular sovereign or state, and signifies membership in a political community. It traces its origin to the time when the city was the largest autonomous unit to which the individual was attached and its meaning has expanded with the growth of that unit into the modern state. It involves a legal and political relationship between the state and the citizen, by virtue of which he is endowed with certain qualities distinguishing him from other individuals.⁹ The conditions on which citizenship shall be acquired and granted, the individuals to whom this status shall be extended, and the rights and obligations incurred by the relationship are fixed by the municipal public law of each state. Allegiance, the tie which binds the citizen to the political group to which he belongs, is due to the state, the juristic personality of the nation. "The machinery through which [the state] operates is its government. The persons who operate this machinery constitute its magistracy. The rules of conduct which the state utters or enforces

⁷ Walker, T. A., *A history of the law of nations*, v. 1, Cambridge, 1899, p. 148 *et seq.*

⁸ Brissaud, J., *A history of French private law*, Boston, 1912, p. 874.

⁹ Gerber, C. F., *Grundzüge des deutschen Staatsrechts*, Leipzig, 1880, 3rd ed., p. 229; Morse, A. P., *A treatise on citizenship*, Boston, 1881, p. x, p. 4, p. 36; Foote, J. A., *Foreign and domestic law, Private international jurisprudence*, London, 1904, 3rd ed., p. 1.

are its law, and manifest its will. This will, viewed as legally supreme, is its sovereignty."¹⁰

Citizenship is essentially a personal relationship, as is sovereignty or the supreme legal authority of the state over those whom it controls. The subjects of the state are all those persons over whom it exercises sovereignty, which in constitutional law include not merely citizens, but aliens residing within its territory or otherwise subject to its control. A territory is not in fact an essential element of sovereignty, although international law has arbitrarily conditioned the enjoyment of membership in the international community on the possession of a territory.¹¹ It is by virtue of the personal relationship involved in sovereignty and citizenship that the state may declare its laws binding on its citizens even when abroad and by virtue of which its obligations to those non-resident citizens continue to exist.¹²

Jurisdiction, or the right of physical control over persons, has, however, become territorial, and thus it occurs that the laws of the state, while theoretically binding on the subject so far as made applicable to him, are unenforceable beyond the territorial limits of the state, unless accompanied by jurisdiction or enforced by the foreign sovereign by international arrangement.¹³ In extraterritorial countries both sovereignty and jurisdiction may be exercised beyond the territorial limits, as is il-

¹⁰ Willoughby, W. W., *Citizenship and allegiance in constitutional and international law*, Amer. Journ. Int. Law, v. 1 (1907), pp. 914, 915.

¹¹ Crane, Robert T., *The state in constitutional and international law*, Baltimore, 1907, p. 69; Hall, *International law*, 6th ed., Oxford, 1909, pp. 17, 19.

¹² Congress exercises the right to regulate certain acts of United States citizens abroad and attach prescribed consequences to those acts. E. P. Wheeler, *The relation of a citizen in a foreign country*, in Amer. Journ. Int. Law, v. 3 (Oct. 1909), p. 871 and cases cited. In England this right rests on Crown prerogative, acts of Parliament and common law. See Hall, W. E., *Foreign powers and jurisdiction of the British Crown*, Oxford, 1894, pp. 8-13. See also Fiore, P., *Nouveau droit international public* (Antoine's trans.), Paris, 1885, v. 1, sec. 644; Lomonaco, G., *Treatato di diritto internazionale pubblico*, Napoli, 1905, p. 166; Martens, F. de, *Traité de droit international*, Paris, 1883, v. 1, p. 442; Despagnet, Frantz, *Cours de droit international public*, 4th ed., Paris, 1910, p. 467.

¹³ The notion that citizens, resident abroad, by virtue of their allegiance, still fall under the operation of the laws of their national state, is a fallacy often encountered in the writings of publicists. They are subject only to such national laws as the legislature expressly makes binding upon them. See Piggott, *Nationality*, London, 1906, v. 1, p. 3.

lustrated by the consular courts of various Powers of the first class in countries like China and Turkey. The will of the state, therefore, is not merely limited in its expression by its constitution and laws, but its enforcement is limited internally by the character of its people and government and externally by the territorial boundaries of the state.¹⁴

In pure constitutional theory, citizenship is imposed by the state by virtue of its sovereignty, on whomsoever it will, and independently of the will of the person. It is not created by or at the consent of the individual.¹⁵ The theory is limited in its application by the international rule that states permit their subjects to acquire a new citizenship or rather predicate their recognition of such a change on the condition that it was a voluntary act of the subject accompanied by an actual change of domicil and political affiliation.

André Weiss, the eminent jurist of Paris, has presented an ingenious and plausible argument to show that citizenship or nationality is contractual in its nature.¹⁶ "It is to-day generally recognized," says Weiss, "that the bond of nationality is a contractual one; and that the bond which unites to the state each of its citizens is formed by an agreement of their wills, express or implied." This theory has been severely criticized, among others by Stoerk¹⁷ and by Piggott,¹⁸ and it is now considered fallacious. Some authors to-day, however, find in the grant of nationality, *i. e.*, naturalization, a public legal act of a bilateral character,¹⁹ but even these publicists admit that the relation is not analogous to a private contractual obligation but rather to the contract of adoption in family law.

¹⁴ Willoughby in Amer. Journ. Int. Law, 1907, p. 925; Heilborn, P., *System des Völkerrechts*, Berlin, 1896, p. 75 *et seq.*, and opinions of Gierke, Oertmann, Gerber and Laband there cited.

¹⁵ Willoughby in Amer. Journ. Int. Law, 1907, p. 924.

¹⁶ *Annuaire de l'Institut de Droit International*, v. 13 (1894), p. 162 *et seq.*

¹⁷ Stoerk, F., *Les changements de nationalité et le droit des gens* in Revue Gen. D. I. P., v. 2 (1895), p. 273 *et seq.* See also Nys, E., *Le droit international*, 2nd ed., Bruxelles, 1912, p. 257.

¹⁸ Piggott, F. T., *Nationality*, London, 1906, v. 1, pp. 5-10.

¹⁹ Laband, Paul, *Das Staatsrecht des deutschen Reichs*, 5th ed., Leipzig, 1911, p. 177; Jellinek, Georg, *System der subjectiven öffentlichen Rechte*, 2nd ed., Tübingen, 1905, p. 198. The majority of publicists deny that the conceptions of private law furnish any analogy to the peculiar relations created by public law. See Stoerk, Felix, *Zur Methodik des öffentlichen Rechts*, Wien, 1885, and authorities there cited.

The relation between the citizen and his state is in fact a relation *sui generis*. Admission into membership in the state and to the status of citizenship is an act of sovereignty. It being neither a contract nor an act of grace, Stoerk has denominated it a sociological fact, a distinguishing mark of the state itself.²⁰ In discussing expatriation, the United States Supreme Court has on several occasions, prior to the expatriation act of July 27, 1868 (R. S. 1999), expressed the opinion that "the doctrine of allegiance * * * rests on the ground of a mutual compact between the government and the citizen or subject, which it is said, cannot be dissolved by either party without the concurrence of the other."²¹

The theory of a compact in the relations between the state and its citizens has engaged the attention of political philosophers for centuries. It became important in the eighteenth century when some writers in the American colonies, appealing to the Englishman Locke, advanced forcibly the theory that the individual enters the state by voluntary agreement, and may establish the conditions of his membership and the limitations of the power of the state. In France, Montesquieu and Rousseau were its most prominent champions. In arriving at the true legal relation of the state and the individual we are not concerned with either of the political theories (1) that the entire sphere of right of the individual is the product of state concession and permission, or (2) that the state not only creates rights but leaves the individual that measure of liberty which it does not itself require in the interest of the whole.²²

Foreigners within the state owe it a considerable measure of obedience in return for the local protection they receive while residents. This obedience has often been termed temporary and qualified allegiance in contradistinction to the permanent and absolute allegiance owed by

²⁰ Stoerk in Rev. Gen. D. I. P., v. 2 (1895), p. 288.

²¹ Inglis v. Sailor's Snug Harbor, 3 Peters (1830), p. 124; Talbot v. Janson, 3 Dallas (1795), 162. See also cases cited by Wise, J. S., *American citizenship*, Northport, 1906, pp. 263-264. While not a mutual compact, it is true that as a status imposed by the state, citizenship and allegiance could only be renounced when permitted by the state. In most modern states, except Russia and Turkey, municipal legislation has granted the individual this power.

²² On this entire subject see Jellinek, G., *The declaration of the rights of man and of citizens*, New York, 1901 (Max Farrand's translation), pp. 80, 90 and 95.

the citizen.²³ In truth, it is a misnomer to speak of "temporary allegiance" due by a foreigner. The nature of the foreigner's subjection to the state of his residence was described by Secretary of State Webster in 1851 in his report on Thrasher's case as follows:²⁴

Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native born subject might be, unless his case is varied by some treaty stipulation.

The migration of the citizen of one state to another and his residence in the latter brings about in constitutional theory a double citizenship, of primary and organic nature with respect to his home state and of a temporary and qualified nature with respect to the state of residence. It subjects the individual for different purposes and in different degrees to the sovereignty of two states. The conflicting claims of two or more states to the citizenship and obedience of the same individual have been to a great extent settled by mutual forbearances, although differences in municipal legislation in some instances still give rise to cases of double nationality and even of no nationality (*Heimatlosen*).

Nationality (which term is less ambiguous than its synonym citizenship) is the most important of the three relations in which a person may be subject to the control of a particular state. These three in the order of the closeness of the bond are actual residence, domicil, and nationality or citizenship (*Staatsangehörigkeit, nationalité*). Used in the ethnographic sense, a nation is a collection of human beings held together by certain common physical or racial characteristics; used in the legal sense, it means a politically united people, and its derivative "nationality" is used to represent the bond which attaches the citizen

²³ Mr. Justice Field in *Carlisle v. United States*, 16 Wallace, p. 147, at p. 154; adopted by Willoughby in *Amer. Journ. Int. Law*, 1907, p. 924.

²⁴ *The works of Daniel Webster*, Boston, 1851, v. VI, p. 518, at p. 526, cited also in *Carlisle v. United States*, 16 Wall. p. 155; see also Mr. Justice Gray in *United States v. Wong Kim Ark*, 169 U. S. 649.

by certain qualities to the state.²⁵ We have already noted that by virtue of the bond, the citizen is provided with certain rights, in particular, political rights, and is charged with the performance of certain duties to his state in return for the benefits of citizenship.²⁶ Stoerk and Oppenheim believe that nationality is a condition precedent to the enjoyment of international rights, which statement von Bar refutes by showing that *heimatlosen* or those without nationality are entitled to these rights.²⁷ International rights are commonly considered to be those which are universally accorded by the national law of all civilized states to individuals within its jurisdiction.

Confusion arises because in the present state of our civilization, the individual, as a human being, is accorded certain fundamental rights by all states professing membership in the international community. In constitutional governments, they have often received the name "rights of man." These rights, uncertain as they are in content, were denominated by Blackstone as the absolute rights of all mankind,—the right to personal security, to liberty and to private property. At one period in the history of law they were known as "natural rights," and this conception played a prominent part in justifying the political philosophy of the eighteenth century which culminated in the French Revolution.²⁸ These rights, as incidental to natural law, the adherents of which school of legal philosophy were the founders of international law, were logically denominated international rights and sometimes human rights. Whether the recognition of these rights is the result of history and the unconscious growth of law or whether it is the result of conscious legislation,²⁹ it is certain that by legislative and judicial

²⁵ Bar, *op. cit.*, p. 111; Stoerk in Holtzendorff's *Handbuch des Völkerrechts*, Berlin, 1885, II, pp. 589-591.

²⁶ Stoerk in Holtzendorff's *Handbuch*, II, pp. 630-636; Heilborn, *op. cit.*, p. 75 *et seq.*; Oppenheim, *International Law*, London, 1912, sec. 291; Gareis, K., *Institutionen des Völkerrechts*, Giessen, 1901, sec. 53; Cockburn, Alexander, *Nationality*, London, 1869, p. 186; Nys, E., *op. cit.*, p. 257.

²⁷ Stoerk in Holtzendorff's *Handbuch*, II, sec. 114, p. 589; Oppenheim, *op. cit.*, I, sec. 291; Bar, *op. cit.*, p. 111.

²⁸ For the history of natural rights and the modern theories see Ritchie, D. G., *Natural rights*, London, 1895, ch. 1 and 2. An analysis of the so-called rights is undertaken by Ritchie, ch. 6 *et seq.*

²⁹ For a summary account of the history of legal theory and the various schools of

declaration certain fundamental rights of the individual in a civilized state have been positivised in the same way that the Roman jurisconsults by their *jus respondendi* positivised the principles of the *jus naturale*.³⁰ These rights, like all rights, are really creations of public sentiment, legally protected interests, which may be expressed either by custom or legislation.

If these rights of a resident alien are violated without proper redress in the state of residence, his home state is warranted by international law in coming to his assistance and interposing diplomatically in his behalf. Reasoning from this fact, many publicists assert that whatever rights the individual has in a state not his own are derived from international law, and are due him by virtue of his nationality. As a matter of fact, the alien derives his rights,—fundamental or human rights and others,—by grant from the territorial legislature, international law fixing a minimum which cannot be transcended and authorizing certain agencies, usually the national state, to remedy and punish a breach. Whether these "rights of humanity" have their origin in international law, or are merely concomitants of existence in a civilized state, the recognition of which rights a state must show as a condition of membership in the international community, international law, nevertheless, provides them with a definite sanction. This view, it would seem, is confirmed by the fact that where a state disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on the grounds of humanity. Where these "human" rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled.³¹ Whatever the origin,

legal thought see Borchard, E. M., *Guide to the law and legal literature of Germany*, Washington, 1912, p. 25 *et seq.*

³⁰ See Muirhead, James, *Historical introduction to the private law of Rome*, London, 1899, 2nd ed., p. 283. See also *Annuaire of the Institute of Int. Law*, v. 1, p. 124.

³¹ Rougier, *La théorie de l'intervention d'humanité* in *Rev. Gen. D. I. P.*, 1910, p. 472. Thus intervention on behalf of co-religionists in the Orient and elsewhere has on numerous occasions been undertaken. Pillet, A., *Principes de droit international privé*, Paris, 1903, p. 171.

therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law, and will be protected, in last resort, by the most appropriate organ of the international community — the national state of the individual or those states whose interests are most directly affected.

The rights of man as proclaimed by the political philosophers of the American and the French revolution were given positive constitutional expression in France and the United States in 1789,³² and since then have in some form been incorporated in most modern constitutions. The municipal law of each state prescribes the manner in which these rights shall be exercised.

Among the rights which we now consider the rights of man, are those to which international lawyers have applied the phrase "international rights," those general rights which the individual enjoys in every part of the globe and which are normally protected by every state of the international family. Martens³³ enumerates these rights as (1) the right to live and procure the necessary means to live; (2) the right to develop his intellectual faculties; (3) the right to come and go freely among the states of the international community. Among the imprescriptible rights of man, which flow from these rights, Martens considers freedom of emigration, the right to be respected in person, life, honor and health, and the right of property. The incidental rights of entering into contracts, marriage, etc., are equally protected, though regulated, when affected by foreign interests, by that branch of municipal law known as private international law. With this universality of rights of the in-

³² There had been a definite declaration of rights in Virginia in 1776, and the preamble and first paragraph of the Declaration of Independence of July 4, 1776 was in the nature of a declaration of rights. These documents with the French *Déclaration des droits de l'homme et du citoyen* of 1789, as prefixed, with amendments, to several French constitutions, are to be found in the appendix to Ritchie, *op. cit.* See also the first ten amendments to the United States Constitution.

These rights of man had been the subject of discussion by political philosophers of France and England for many years before 1789. They received most forceful expression in the American colonies in numerous pamphlets and tracts, notably those of James Otis and Samuel Adams. See Jellinek, G., *The declaration of the rights of man and of citizens* (translated by M. Farrand), New York, 1901, pp. 80-84.

³³ Martens, F. de, *Traité de droit international*, Paris, 1883, v. 1, p. 440. See also Garcis, *op. cit.*, p. 150.

dividual in view, Stoerk and others have coined the term "*Völkerrechtsindigenat*,"³⁴ or, as Bentham has expressed it, "citizen of the world."³⁵

Four principles dominate the bond of nationality. The first embodies the idea of legal attachment, expressed in former times by membership in a clan or tribe, advancing later into the broader bond of membership in a city, state and nation. This quality Stoerk calls the *civitas* or the quality of belonging to some nation, as every vessel at sea is recognized as belonging to some organized community.³⁶ The second principle is the *exclusiveness* of nationality. In theory and in aim public law ascribes only one nationality to an individual, though differences in the municipal law of different states have occasionally endowed an individual with plural nationality. The third is the principle of *mutability*, which permits the individual at the present day to change his nationality; and the fourth, the principle of *continuity*, by which the nationality of origin is retained until a new one is acquired. Emigration without naturalization in another state does not break the bond of nationality. Such emigration may by municipal law under certain conditions involve a loss of diplomatic protection, but this is only one of the rights incidental to citizenship.

The same individual, as we have seen, is sometimes claimed as a citizen by two or more states, due to differences in their municipal legislation as to when citizenship begins and ends. The concurrent claims of the *jus soli* and the *jus sanguinis*, the absolute or conditional refusal of some states, as Russia and Turkey, to permit expatriation, followed nevertheless by the naturalization of their emigrating subjects by other states, or any new naturalization before the bond of allegiance to the original state has been severed, create cases of double nationality which have given rise to serious conflicts. Again, the imposition by some states of a deprivation of nationality as a penalty for certain acts, or a predication of loss of nationality upon mere residence abroad for a certain period, brings about the equally anomalous situation of an individual

³⁴ Stoerk in Holtzendorff's *Handbuch*, v. 2, sec. 113-114; Gareis, *op. cit.*, sec. 53.

³⁵ Extracts printed in Wheaton's *History of the law of nations*, New York, 1845, pp. 329-331.

³⁶ Stoerk in Rev. Gen. D. I. P., *supra*, v. 2 (1895), p. 277 *et seq.*

without nationality or the *heimatlos*.³⁷ By international agreements and municipal law, states have within the past forty years endeavored to remove these sources of conflict, or at least by mutual concessions to agree on the circumstances under which protection shall be accorded and permitted.

In the international sense the citizens of a state are those individuals over whom the state is admitted by the international community to have primary authority. There is, however, a difference between the citizens of international law and those of constitutional law. Leaving aside the broad constitutional principle that the state may impose its citizenship on all those within its sovereignty, there are classes of persons who, while not citizens in constitutional law, are nevertheless subjects of the state or nationals in international law. So, for example, the negroes before the Civil War, the American Indians, and natives of the unincorporated insular possessions, are citizens of the United States in international law, though not constitutionally citizens.³⁸ Nor are constitutional disabilities attached to age or sex of any international concern.

Again, a person may be a citizen in constitutional law without being a citizen in international law. This case occurs in federal nations like the United States for example. A person may be a citizen of a State without being a citizen of the United States. Confusion arises because, whereas the status of citizenship is a national grant, the enjoyment of many of its rights is within the jurisdiction of the States, and from the possession of these rights the term "State citizenship" has arisen. To be a citizen of the United States, birth or naturalization in the United States is necessary; to be a citizen of a State, usually only residence is required. Nor is the right to vote a criterion. This right is not granted

³⁷ Weiss in *Annuaire de l'Institut*, v. 13, p. 174-176, has mentioned eight cases in which conflicts in municipal law have most frequently caused cases of double nationality. See also Cockburn, *op. cit.* pp. 108, 186, 187. Many publicists consider municipal penalties of loss of nationality as wrong in principle, as they increase the number of persons without nationality.

³⁸ Wolfman, Nathan, *Status of a foreigner who has declared his intention of becoming a citizen of the United States*, in *American Law Review*, v. 41 (1907), p. 499; Coudert, Frederic R., Jr., *Our new peoples: citizens, subjects, nationals or aliens*, *Columbia Law Review*, v. 3 (1903), pp. 13-32.

or guaranteed by the federal Constitution, but is conferred and regulated by the States. This right is in some States even granted to persons not citizens either of the State or of the United States.³⁹ In the British Empire, with its scattered dominions, the term "British citizenship" has received a peculiarly local meaning, not extended for example to the natives of India.⁴⁰ In our international use of the term citizenship or nationality we are not concerned with variations in the municipal tests or degrees of citizenship, nor need we be detained by any supposed difference between the terms "subject" and "citizen," the former applying generally to nationals of a state whose government is a monarchy, the latter to those where there is no kingship. The term "nationals" is perhaps the most appropriate, inasmuch as it disregards differences in constitution and form of government.

As we have seen, the mere separation of the individual from his home soil leaves him still subject to the law of his own state in so far as this has been made applicable to him. This remains so until physically and legally he has become incorporated as a citizen of another state. The continuity of the bond is evidence of the continuation of the reciprocal relations between the state and the citizen. We may now briefly enumerate the most important of the rights and duties which exist between the state and its citizen abroad.

First, self-preservation gives the state the necessary right of calling upon its citizen for military duty, for which purpose the state may recall its absent citizen.⁴¹ The state of residence is not, however, obliged to facilitate his return to fulfill the obligations imposed by his national law, though it is bound not to prevent his performance of these duties. The machinery provided for retaining control of the citizen abroad and for assuring him the enjoyment of certain international rights is the consular and diplomatic office, which is governed by such rules of national municipal law as the territorial state, by comity and the force

³⁹ Van Dyne, F., *Citizenship of the United States*, Rochester, 1904, p. 111.

⁴⁰ Sargent, E. B., *British citizenship in United Empire*, v. 3 (May, 1912), p. 366, 373.

⁴¹ Stoerk in Holtzendorff's *Handbuch*, v. 2, pp. 630 *et seq.*; Bluntschli, *Droit international codifié* (Lardy's ed.) 5th ed., Paris, 1895, sec. 375; Martens, F. de, *op. cit.*, p. 442; Bonfils, H., *Manuel de droit international public*, 6th ed. (by Fauchille), Paris, 1912, sec. 433.

of the principle of protective surveillance of the national state over its citizens, has permitted it to apply.

Again, the state may impose certain taxes upon the citizen abroad, though international practice, except in cases of great national necessity, ascribes the collection of personal taxes to the state of residence.⁴² Questions of double taxation are still an important source of international difficulty.⁴³

These requirements and injunctions of national law are binding between the state and its citizen, and impose duties upon him. The extent to which they are enforceable and their effect is measured by the application of the territorial principle, according to which, except for such concessions as are made by other states, national law loses its coercive force at the frontiers of its territorial dominions. If effect is given by other states to these provisions of national law it is the result of concession in derogation of local territorial jurisdiction, which concessions by custom and comity have become a definite and important part of international law. Nevertheless, the failure to obey national law by a citizen abroad is not without its consequences in the home state. It may be met either immediately by a loss of national protection and sometimes denationalization, or else with penalties inflicted either on property of the individual in the national state or upon rights which he may have retained there, or on his person when he returns.⁴⁴ Similarly, many states punish their citizens on return for crimes committed abroad. In a general way, the exercise of this right of the state to punish its delinquent citizen depends, (1) upon the intrinsic importance of the offense, — thus some states, as for example, Great Britain and the United States, limit to such punishment the important crimes such as treason, counterfeiting the national coinage, etc.; (2) on its

⁴² Stoerk in Holtzendorff's *Handbuch*, v. 2, p. 631; Bluntschli, *op. cit.*, sec. 376.

⁴³ Wittmann, Ernö, *Double imposts*, in 24th Report of the International Law Association (at Portland), London, 1908, pp. 214-229; Bar, *op. cit.*, p. 245 *et seq.*

⁴⁴ Germany, by the law of July 1, 1870, Art. 20, reserves the right to punish with denationalization the failure to heed the summons to return. Art. 22 provides the same penalty for those who, having entered the service of a foreign state do not, on demand, resign their office. The Hungarian law of Dec. 20, 1879 (Art. 50, *Annuaire de législation étrangère*, 1880, p. 351) makes a similar provision. See also French civil code, Art. 17, sec. 4, as amended by law of June 26, 1889 and Art. 17, sec. 3. See also Chrétien, *Principes de droit international public*, Paris, 1893, p. 218.

effect upon his own state and its citizens; and (3) on its punishability by national law and by the *lex loci actus*. If the penalty has already been paid in the place where the crime was committed, the home state will not usually enforce its own penalty, and this is always the case where the crime is against local law alone.⁴⁵ As in most cases where the individual is thus subject to the laws of two states, it is by mutual agreement and concession of the respective states that the rights and obligations of the individual are controlled and regulated, the object being to permit him neither to escape obligations nor twice to be subject to them.

The control of the national state is again evidenced in the fact that by the legislation of many countries the acceptance of foreign titles is conditioned upon the consent of the national sovereign.⁴⁶ So compliance with national law is occasionally necessary to the marriage of citizens abroad. National consent is sometimes a prerequisite to the marriage of military officers, as in Austria, Germany and France.⁴⁷ Those countries which do not admit of divorce, as for example, Italy and Brazil, decline to give legal effect to a divorce of their nationals in a state where such divorce is legal.⁴⁸

There is a large field of private international law in which the individual's national law controls his legal relations abroad. Thus his personal status, and his capacity to enter into certain contracts, as, for example, marriage, his right to succession, questions of guardianship and similar matters are now largely controlled by his national law.⁴⁹ This personal law of the individual, which the principle of territoriality

⁴⁵ An exhaustive comparative study of the subject of extraterritorial crime with extracts from the statutes of the more important countries and quotations from the writings of publicists is to be found in John Bassett Moore's *Report on extraterritorial crime and the Cutting case*, Washington, 1887, 129 p. See also Chrétien, *op. cit.*, p. 221.

⁴⁶ Stoerk in Holtzendorff's *Handbuch*, v. 2, p. 631; Chrétien, *op. cit.*, p. 218; Law of Costa Rica, Dec. 20, 1886, Art. 4, *Annuaire de législation étrangère*, 1887, p. 869.

⁴⁷ Renton, A. W. & Phillimore, G. G., *The Comparative law of marriage and divorce*, London, 1910, pp. 253-254.

⁴⁸ Buzzati, G. C., *Le droit international privé d'après les conventions de la Haye*, French translation by Francis Rey, Paris, Larose & Tenin, 1911.

⁴⁹ Bluntschli, *op. cit.*, sec. 379; Rolin, A., *Principes de droit international privé*, Paris, 1897, v. 1, p. 114.

has recognized, is directly connected with the period of the early Middle Ages when the personal law or personal statute controlled the entire legal status of the individual.

Before jurisdiction became national within a politically and geographically defined territory, this personal law was usually the law of the domicil, an inheritance from the Roman law.⁵⁰ The legislation following the French Revolution (for example, Article 3 of the French Code Napoléon) first gave expression to the principle of nationality as controlling the status and capacity of persons. This principle was followed in the Austrian *Allgemeines bürgerliches Gesetzbuch* of 1811 (Article 4), though the capacity of foreigners was still left to the old rule of domicil. The principle of nationality, however, as governing status, capacity and the family relations received its greatest impetus from the Italian school, of which Mancani was the principal apostle, and after adoption in the civil code of Italy, Spain, Germany and to some extent by Switzerland, it has been recognized by almost all the countries of Europe in the Hague Conventions on private international law, resulting from the conferences of 1893, 1894, 1900 and 1904.⁵¹ Certain federal states like Switzerland still lend great emphasis to the principle of domicil as the criterion of status and capacity, as do the United States and Great Britain. Where political nationality is distributed throughout the world among various systems of private law, as for example, British nationality, which exists in Quebec, Scotland and South Africa, this personal law must refer to domicil within the political nationality.

The state in turn undertakes toward its citizens certain duties which are an outgrowth of the relation itself, but which in their exercise are the result of international agreement and concession. The most important of these duties of the state is the obligation to receive its own

⁵⁰ Bar, *op. cit.*, p. 112; see also Savigny, *op. cit.*, p. 88 *et seq.*

⁵¹ These conventions established rules concerning the adjustment of conflicts of law in matters of marriage, divorce and guardianship. With but slight qualifications, the law of the nationality was adopted as the law governing these legal relations. See Meili, F. und Mamelok, A., *Das internationale Privat-und Zivilprozessrecht auf Grund der Haager Konventionen*, Zürich, 1911. See also Westlake, J., *A treatise on private international law*, 4th ed., London, 1905, p. 27 *et seq.*

citizens expelled by other states, or repatriation.⁵² This obligation von Bar considers the true kernel of nationality.⁵³ Banishment is now practically abandoned as a penalty against citizens. No state can legally require other states to receive its banished citizen, and if they were to refuse him admission, it would be obliged to accept him again as a resident member of the national community.

The second duty which is imposed upon the state by virtue of the relationship is the protection of its citizen abroad. The security of international intercourse depends upon the fact, recognized by the practice of nations, that states assume toward their citizens the obligation, and possess as against other states the right, of assuring their citizen abroad the exercise and enjoyment of certain legal rights.

PROTECTION ABROAD

The bond of citizenship implies that the state must watch over its citizens abroad. Too severe an assertion of territorial control over them by the state of residence will be met by the emergence of the protective right of the national state and the potential force of this phenomenon has largely shaped the rights assumed by states over resident aliens.

The principles of territorial jurisdiction and personal sovereignty are mutually corrective forces. An excessive application of the territorial principle is limited by the custom which grants foreign states certain rights over their citizens abroad, sometimes merely the application of foreign law by the local courts, sometimes, in acknowledgment of the principle of protection, a certain amount of jurisdiction. In the Orient and in semi-civilized states this often involves a complete surrender of local jurisdiction in favor of the foreign state, and in states conforming more closely to the highest type of civilized government, it consists in partial derogations from territorial jurisdiction in special classes of cases, *e. g.*, consular jurisdiction in certain commercial disputes and over national merchant vessels.⁵⁴ These concessions are

⁵² Martitz, F. von, *Das Recht der Staatsangehörigkeit im internationalen Verkehr* in Hirth's *Annualen des deutschen Reichs*, 1875, p. 794; Stoerk in Rev. Gen. D. I. P., 1895, p. 288; also in Holtzendorff's *Handbuch*, II, sec. 119; Gareis, *op. cit.*, p. 163.

⁵³ Bar, *op. cit.*, p. 139.

⁵⁴ Hall, W. E., *Foreign powers and jurisdiction*, Oxford, 1894, pp. 4-6.

made to assure individuals the most appropriate regulative agency for their legal relations.

It is the obligation of every state to regard the citizens of other states as the subjects of legal rights.⁵⁵ Whether such recognition is compelled by international law, or by municipal law in fulfillment of obligations imposed by international law is of some theoretical interest and will be discussed briefly hereafter.

When the citizen leaves the national territory he enters the domain of international law. By residence abroad he not merely carries with him certain rights and duties imposed by the municipal law of his own state, but he enters into a new sphere of mutual rights and obligations between himself as a resident alien and the state of his residence. A failure on his part to comply with these newly created obligations is met by repression and punishment in the local courts. A failure of the state to fulfill its obligations toward the alien is met by repression on the part of his home estate. The extent of this obligation toward the resident alien has been measured by international law and practice, though the very nature of repressive action has permitted the element of physical power and political expediency at times to obscure and even obliterate purely legal rights.

Legally, the measure of the obligation of the state of residence to resident aliens is the measure of the national state's right. The extent of the failure to fulfill the obligation, ordinarily known as the international responsibility of the state, is in exact proportion to the amount of diplomatic pressure or protection which the national state is authorized to interpose.

States are legal persons and the direct subjects of international law. They are admitted into the international community on condition that they possess certain essential characteristics, such as a defined territory, independence, etc. In addition, they must manifest their power to exercise jurisdiction effectively and, as we shall see, to assure foreigners within it of a minimum of rights. This minimum standard below which a state can not fall without incurring responsibility to the other members of the international community has been shaped and established by the advance of civilization and the necessities of modern international

⁵⁵ Heilborn, *op. cit.*, p. 75 *et seq.*

intercourse on the part of individuals. The home state of the resident alien is concerned not with the legal legitimacy of a foreign government,⁵⁶ but with its actual ability to fulfill the obligations which this international standard imposes upon it. The resident alien does not derive his rights directly from international law, but from the municipal law of the state of residence, though international law imposes upon that state certain obligations which under the sanction of responsibility to the other states of the international community, it is compelled to fulfill. When the local state fails to fulfill these duties, "when it is incapable of ruling, or rules with patent injustice," the right of diplomatic protection inures to those states whose citizens have been injured by the governmental delinquency.⁵⁷

International law recognizes on the part of each member of the family of nations certain norms or attributes of government for the purpose of assuring the rights of the individual. The independence of states, with the right of administering law and justice uncontrolled by other states, is one of the norms by which this end is attained. In countries which habitually maintain effective government, the protection of the national government of a resident alien is usually limited to calling the attention of the local government to the performance of its international duty. The right, however, is always reserved, and in the case of less stable and well-ordered governments frequently exercised, of taking more effective measures to secure to their citizens abroad a measure of fair treatment conforming to the international standard of justice. While the right of every state to exercise sovereignty and jurisdiction within its territory over all persons within it is recognized, foreign nations retain over their citizens abroad a protective surveillance to see that their rights as individuals receive the just measure of recognition established by the principles of international law.⁵⁸ Diplomatic protection, therefore,

⁵⁶ The assassination of the King of Servia by certain nobles and of President Madero by rebels was of no special international concern, in view of the immediate establishment of a government having the power to fulfill the international obligations of the state.

⁵⁷ Hall, W. E., *Foreign powers and jurisdiction*, p. 4; Bluntschli, *op. cit.*, sec. 380.

⁵⁸ Address before the American Society of International Law, April 29, 1910, *Proceedings of the Fourth Annual Meeting*, p. 46; Heilborn, *op. cit.*, p. 64 *et seq.*; Pillet, A.,

is a complementary or reserved right invoked only when the state of residence fails to conform with this international standard.

The rules of international law in this matter fall with particular severity upon those countries where law and administration frequently deviate from and fall below this standard; for, the fact that their own citizens can be compelled to accept such maladministration is not a criterion for the measure of treatment which the alien can demand, and international practice seems to have denied these countries the right to avail themselves of the usual defense that the alien is given the benefit of the same laws, the same administration, and the same protection as the national.

The broad principle of international law that when an individual establishes himself in a foreign state he renders himself subject to the territorial jurisdiction of that state and must normally accept the institutions which the inhabitants of the state find suitable to themselves, must be viewed in its relation to the complementary principle that the individual in question still owes allegiance to his own state and will be protected by that state when his rights, as measured not by the local, but by the international standard, are invaded.

THE PROTECTIVE FUNCTION

In arriving at the basis for the external activity of the state in protecting citizens abroad, we are led into the field of the true function of the state. Being concerned primarily with international law, or the material and external sides of state activity, we can avoid all abstract philosophy, with the attempt to bring the meaning of the term "state" into harmony with a general theory of the universe.⁵⁹

From the beginning of civilization, the relation between the state and the individual and the proper sphere of the activity of each have been discussed by political philosophers. Under the ancient theory of the state, especially among the Greeks, the state was regarded as the ultimate aim of human life, an end in itself.⁶⁰ Individuals appeared only

Recherches sur les droits fondamentaux des états, Paris, 1899, p. 19 *et seq.*, particularly at p. 28.

⁵⁹ McKechnie, S. W., *The state and the individual*, Glasgow, 1896, p. 52.

⁶⁰ Bluntschli, J. K., *The theory of the state*, Oxford, 1898, p. 305.

as parts of the state; their rights and welfare were recognized only to the extent that it was serviceable to the state. By the time of the Romans, with its absence of political freedom but strong protection for private rights, a more just sense of the relations between state and individual obtained, at least so far as the sphere of law is concerned. The Kantian theory of the *Rechtstaat* considered the sole duty of the state the maintenance of the legal security of each individual. This attempt to narrow the sphere of governmental activity was adopted by the orthodox political economy which reduced the function of the state to the minimum of maintaining security.⁶¹ A more modern theory, entirely individualistic and utilitarian, supported strongly by Macaulay, Bentham and John Stuart Mill, regarded the state as a means only to insure and increase the sum of private happiness.⁶²

The one-sidedness of each of these views has become more evident with the growth of social legislation during the past generation. The state is not merely an end in itself, nor only a means to secure individual welfare. Just as the nation is something more than a sum of the individuals belonging to it, so the national welfare is more than the sum of individual welfare. National welfare and individual welfare are indeed intimately bound together. In an impairment of individual rights, the state, the social solidarity, is affected;⁶³ yet where, in a particular case, the redress of the individual wrong would involve too great a social cost, it may be overlooked, and the measurement of the balance of advantages is in the discretion of the government.

The assurance of the welfare of individuals, therefore, is a primary function of the state, accomplished internally by the agency of municipal public law, and externally through the instrumentalities of international law and diplomacy. The establishment of the machinery to insure this object constitutes an essential function of state activity — within, protecting every member of society from injustice or oppression by every other member; without, protecting its citizens from violence

⁶¹ Duguit, L., *Etudes de droit public. 1. L'état, le droit objectif et la loi positive*, Paris, 1901, p. 288. See the theories of Kant and Humboldt as discussed in Bluntschli, *op. cit.*, p. 68.

⁶² McKechnie, *op. cit.*, p. 77; Ritchie, *op. cit.*, p. 87.

⁶³ Duguit, *op. cit.*, p. 290.

and oppression by other states. Authorities differ in giving expression to this function of the state, but modern publicists agree that it finds its basis in the nature of the state and in the doctrine of Locke that "the end of government is the good of mankind."⁶⁴

International lawyers, unwilling to indulge in philosophical speculation as to the relation between the state and the individual, assert that the final mission of the state and the aim of international organization culminates in the guaranty of the collective security of the nation and the personal security of the individual and of his rights, and the promotion of social and individual welfare.⁶⁵ Diplomatic protection, therefore, as a governmental function to achieve security and justice, results from the very nature of the state.⁶⁶ It is entirely consistent with the principle of independence, when it is recalled that the latter, as an attribute of states, is only recognized by international law on the theory that it is the best means of accomplishing state functions. Its basis being practical, international law permits it to be set aside when it is misapplied, by the diplomatic interposition of those states whose interests, through their citizens, have been prejudiced by the delinquency. It thus conforms with the aim of international organization — the advancement and perfection of those rights which the modern development of international law, by custom and treaty, has recognized as inherent in the individual.

EDWIN M. BORCHARD.

⁶⁴ McKechmie, *op. cit.*, p. 74; Bluntschli, *op. cit.*, p. 319 *et seq.* For an account of the contributions of a long line of publicists to political theory and philosophy, especially as involved in the relation of the state to the individual, and the struggle between authority and liberty, see the works of McKechmie, Bluntschli, and Duguit cited above, and Yeaman, G. H., *The study of government*, Boston, 1871, and Leroy-Beaulieu, P., *The modern state in relation to society and the individual*, London, 1891.

⁶⁵ See *e. g.*, Martens, *op. cit.*, sec. 75; Holtzendorff's *Handbuch*, I, sec. 15; and Huber, *Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts u. Staatengesellschaft* in *Jahrbuch des Öffentlichen Rechts*, v. 4 (1910), pp. 56-134; Hobhouse, Leonard T., *Social evolution and political theory*, New York, 1911, Chap. IX; Wilson, Roland K., *The province of the state*, London, 1911, Chap. I and II.

⁶⁶ Pillet, A., *Le droit international public, ses éléments constitutifs, domaine et objet*, Rev. Gen. D. I. P., v. 1 (1894), p. 5.

THE PRISONER OF WAR¹

There is probably no branch of the laws of war which stands in greater need of explanatory comment than do the chapters relating to prisoners of war. The generation preceding the great peace conferences at The Hague was marked by a number of important wars of which continental Europe was the theater; during these conflicts the number of persons reduced to captivity surpassed all experience, as did the number of problems which arose in connection with their safe-keeping and repatriation; but during the entire period the regulations governing their administration and detention remained substantially unchanged. It is true that several European states caused their regulations in that regard to be revised, but as those regulations were strictly internal in character and had no external operation, save in the territory of the enemy which they held in military occupation, the condition of prisoners of war remained substantially unchanged. Indeed, until the condition of this unfortunate class was made the subject of conventional regulation at The Hague, but few important ameliorations had been brought about in their status since the activity of the Emperor Napoleon was brought to a close at the battle of Waterloo.

In the preparation of his interesting treatise M. du Payrat speaks from two distinct and widely separated points of view — the lawyer and the soldier: — from both of these the subject has been studied in all of its aspects and relations. Approaching his task in a broadly humanitarian spirit, he has endeavored to make clear to his readers the onerous and humiliating situation of the prisoner of war in all ages and in many civilizations; but it has equally been his purpose to place before the student the rules of international law which now regulate their capture and custody, together with their final release and repatriation.

As a result of the attention that has been given to the treatment of

¹ *The Prisoner of War in Continental War*, Armand du Payrat, Docteur en Droit, Ancien Officier de Cavalerie. Paris: Arthur Rousseau, 1910. pp. 453.

prisoners of war in relatively recent years, their deplorable situation is now better understood than was formerly the case, and, thanks to the work of the two peace conferences at The Hague, that situation has been made the subject of conventional regulation; the purpose of the new rules being to secure greater humanity and liberality in their treatment and to obtain international consent for the beneficent operation of the rules so conceived and sanctioned. In addition to this, many of the states that were parties to the Hague Conventions have caused instructions to be prepared, in furtherance of the treaties, for the guidance of the officers and men composing their military establishments; these have also been supplemented by the organization of relief societies having for their purpose to alleviate the hardships and provide for the immediate necessities of prisoners of war, without regard to nationality, who have been deprived of their liberty as the result of military operations in which they have been not only unfortunate but unsuccessful.

The portions of the work in which the history of prisoners of war is discussed are unusually interesting. In ancient times the question of the disposition of captives in war was an extremely simple one — as no prisoners were taken; the purpose of war was to annihilate the armies of the enemy and thus weaken the state which they were appointed to defend. Not only were captives put to death, but the soldiers were encouraged to kill women and children, and even old men, upon the theory that, by such wholesale destruction, the military strength of the enemy would be so largely reduced as to become negligible in future operations. The ancient practice is but too fully illustrated by examples. Hermocrates, the Syracusan general, who had ordered his troops to treat the defeated Athenians with moderation, was sent into exile. The Romans can hardly be said to have stood in need of incitement to battle or destruction, but Germanicus, in his operations against the Germans under Arminius is said to have urged his legionaries to be implacable in slaughter for "we shall have no peace save by the complete destruction of the nation." Tacitus goes on to say that the Roman soldiers "bathed themselves in the blood of their enemies until nightfall." In the operations against Jerusalem, carried on by Vespasian and his successor, Titus, in the first century of our era, the efforts put forth with a view to the annihilation of the defenders of the city failed, according to

Tacitus, "because there were not places enough for crosses nor crosses enough for the victims of the massacre."

The Romans were the first to perceive the economic value of captives taken in war by reducing them to slavery, and shortly extended the traffic by organized raids into territory which had not yet fallen under the Roman dominion, for the purpose of adding captives of both sexes and all ages to the slave population of the city. The captives were publicly sold and a portion of the proceeds distributed, as booty, to individual captors, the balance being deposited to the credit of the state, or taken possession of by the general in command of the capturing forces. Cæsar placed in the general treasury the money received from the sale of 53,000 Belgæ who were reduced to slavery during his second campaign in Gaul. Not only was the institution of slavery recognized and practiced in Rome, but it was assigned a definite legal status. "Slaves are so called," according to the Institutes of Justinian, "because the generals have the habit of selling their prisoners and thus preserving their lives, instead of causing them to be put to death." Although the Romans were entirely mercenary in sparing the lives of their prisoners of war, there can be no doubt that the effects of the newer practice were to mitigate to some extent the unfortunate situation of the captive, if, indeed, a life of slavery under the severe and pitiless control of Roman slave-owners could have been regarded as preferable to death.

The adoption of the less severe practice, however, was not due to considerations of either humanity or mercy, and the Roman customs of war continued to be characterized by great cruelty and barbarity during the entire corporate existence of the empire. For the captive in war, death continued to be the rule, and life, with perpetual servitude, the occasional exception. It must be conceded, however, that, when the status of slavery received legal recognition, Roman citizens who were so unfortunate as to become prisoners of war were included in the operation of the laws and, while so situated, were treated with the same rigor as alien enemies. The Roman prisoner became the slave of his captor and, during his captivity, ceased to enjoy the rights of a Roman citizen, or to continue in the exercise of his functions as the head of the family. He recovered his civil and family rights when his captivity terminated, by ransom, recapture or repurchase, in the operation of the fiction of

postliminy, which has been revived, in modern times, to enable prize courts to determine questions of recapture and salvage in maritime war.

The softening and humanizing effects of the general spread of Christianity throughout the empire only resulted in the introduction of the practice of ransom, in the operation of which a prisoner of war was released from captivity by the payment of a stipulated sum of money, or by the surrender of specific property to his individual captor. As the immunity so acquired was strictly individual in character and availed nothing as against another enemy of the same nationality, its progress was extremely slow, although strongly supported by the Church and its powerful representatives. The efficacy of the practice, as a method of terminating the status of captivity in a particular case, depended upon whether the payment of the ransom was recognized by the captor's state in the form of a willingness to guarantee the performance of the ransom contract. As will presently appear, the practice survived until the end of the eighteenth century, and is still mentioned in the text books as of possible application to merchant ships which have been captured by the enemy in time of war.

During the early part of the Middle Ages prisoners continued to be put to death, with an alternative of reduction to slavery, mitigated at times by the payment of ransom. The efforts of the Church to mitigate the hardships of prisoners, especially such as were subjects of states that acknowledged the supremacy of the Holy See, continued to be put forth and, after the establishment of the institution of chivalry, were strongly supported by the individual knights and by their organized commanderies. The results were seen in the increased importance attached to good faith in ransom undertakings and in the growing disposition to accord humane treatment to captives who, deprived of their weapons of war, were without power to protect themselves.

But substantial improvements in the treatment of prisoners of war were impossible at this period for reasons that will be readily apparent. It is of the first importance that the castles or other places chosen for their confinement should be dry, well ventilated and sheltered from the weather. No such places existed. It was equally essential that the prisoners should be provided with wholesome and sufficient food. Such food could not then be obtained, in any quantity, in the markets of

central Europe. Prisoners as a class were especially liable to camp diseases, and to the epidemics that scoured Europe during and well beyond the Middle Ages; but surgeons, as well as medicines and hospital stores, simply did not exist. The most beneficently disposed captor was therefore able to do but little for the comfort of the individuals of the enemy whom the fortunes of war had thrown into his power; their lives were spared, if ransom was possible; failing that they were put to death or reduced to slavery. These conditions were inevitable if we consider the character of medieval warfare. The wandering armed bands of the period were unworthy of the name of disciplined troops, and the rudely organized governments that assumed to maintain them were as little entitled to the designation of civilized states. The feudal levies were without coherence and seriously deficient in organization and discipline; they lived on the country in which they fought, or through which they passed to more distant fields of military endeavor, and spared neither neutral nor enemy in their exactions in the way of food, forage and shelter. Their dietary was meagre in the extreme: they lived from hand to mouth, and maintained no magazines or stores of food for use in future operations. For that reason there were no supplies available for issue to prisoners, especially when considerable numbers of captives had been taken in battle, and it is not surprising that those prisoners who could not possibly be supported should have been put to the sword — a cruel resource, but one not to be wondered at in view of the rude character of the times. The situation of prisoners of war continued without substantial change in continental Europe until the outbreak of the Thirty Years' War. No causes were as yet at work which were calculated to improve social conditions in continental Europe. More than a century and a half were to pass between the Treaty of Westphalia and the philanthropic labors of John Howard in behalf of prisoners, and two centuries were to elapse before the act of emancipation, enacted in response to an aroused public sentiment, was to mark the first step in the great movement which was to result in the liberation of slaves in the states constituting the civilized world.

It is interesting to note the views in respect to the treatment of prisoners of war which were held by two text-writers of acknowledged eminence. Grotius wrote at the end of the first quarter of the seven-

teenth century, when the results of the Thirty Years' War, then in progress, were beginning to be perceived by students of international law; Vattel's great work appeared a century and a quarter later, when the states of Europe had finally adjusted themselves to the consequences of the Treaty of Westphalia. Grotius held that prisoners of war became slaves under the law of nations: "But by the law of nations, which I am now treating of, slavery is of a more large extent, both as to persons and effects. For if we consider the persons, not only they who surrender themselves, or submit by promise to slavery, are reputed slaves; but all persons whatsoever taken in a solemn war, as soon as they shall be brought into a place whereof the enemy is master. * * * Neither is any previous crime required, for here every one's condition is alike, even of those who have unhappily been found among the enemies upon the sudden breaking out of the war."² He also contended that the property and goods of the prisoner passed to the captor. He concedes a certain "attenuation" in the operation of the rule by which Christian captives are only held in bondage until their ransom has been paid.³ It will thus be seen that the rules stated by Grotius were but slightly more humane than those which had prevailed in Europe during the period of the Dark Ages.

Vattel, writing after more than a century of enlightenment had elapsed since the appearance of the work of his great predecessor, strongly disapproves, in principle, of the reduction of prisoners of war to slavery, but does not see his way clear to say that the practice is in opposition to the generally accepted rules of international law. On this point he says: "Is it lawful to condemn prisoners of war to slavery? Yes, in cases which give a right to kill them — when they have rendered themselves personally guilty of some crime deserving of death. The ancients used to sell their prisoners of war for slaves. They indeed thought they had a right to put them to death. In every circumstance when I cannot innocently take away my prisoner's life, I have no right to make him a slave. If I spare his life and condemn him to a state so contrary to the nature of man, I still continue with him in the state of war. He lies under no obligation to me, for what is life without free-

² Grotius, Book III, ch. VII, p. 602.

³ *Ibid.*, p. 608.

dom? If any one counts life a favor when the grant of it is attended with chains — be it so; let him accept kindness, submit to the destiny that awaits him, and fulfil the duties annexed to it. But he must apply to some other writer to teach him those duties: there have been authors enough who have amply treated of them; I shall dwell no longer on the subject; and, indeed, that disgrace to humanity is happily banished from Europe.”⁴ Elsewhere he says, in speaking of the treatment accorded to prisoners of war in Europe: “A man of exalted soul no longer feels any emotions but those of compassion towards a conquered enemy who has submitted to his arms. Let us in this particular bestow on the European nations the praise to which they are justly entitled. Prisoners of war are seldom ill treated among them. We extol the English and French, we feel our bosoms glow with love for them, when we hear the accounts of the treatment which prisoners of war, on both sides, have experienced from those generous nations. And what is more, by a custom which equally displays the honor and humanity of the Europeans, an officer, taken prisoner of war, is released on his parole and enjoys the comfort of passing the time of his captivity in his own country, in the midst of his family; and the party who have released him, rest as perfectly sure of him, as if they had him confined in irons.”⁵

One may be sure that the great writer’s bosom would have “glowed” had he visited the hulks in which the American prisoners were confined during the War of the Revolution, or the places in which galley slaves toiled at the oar on the shores of the Mediterranean. Indeed, the condition of prisoners of war improved but slowly, from year to year, and had changed but little for the better at so late a date as the Treaty of Westphalia. Prisoners were no longer reduced to slavery, but ransom continued to exist, and the provision made for their shelter and support was notoriously inadequate. Chivalry had passed away, but the influence of the Church continued to be put forth in behalf of captives, especially those who were held by infidels. As a consequence of its efforts slavery had practically ceased to exist, and considerable modifications had been introduced into the practice of ransom. Beyond that,

⁴ Vattel, Liv. III, ch. VIII, § 152.

⁵ *Ibid.*, § 150.

save to counsel greater humanity, it was impossible even for the Church to go.

It remained for Montesquieu and Jean Jacques Rousseau to formulate the principle which lies at the foundation of the modern treatment of prisoners of war; that the captive is the prisoner of the state—not of the individual captor. Montesquieu says: "The only right that war gives over a captive is to secure his safe-keeping and prevent him from doing harm."⁶ Rousseau, in his *Contrat Social*—a work which exercised a profound influence over the minds of men in the last half of the eighteenth century, takes the ground that "war is a relation—not between man and man, but between state and state, in which individual combatants are only casually and accidentally enemies; not as men, or as citizens, but as soldiers. The end and aim of war is the destruction of the enemy's state, in which one has the right to kill the defenders of the state, whom he encounters with arms in their hands; but, as soon as they lay down their arms and surrender, they cease to be enemies; they become men, and one has no longer the right to take their lives. The deprivation of their liberty is the only measure that may be resorted to, and this solely with a view to prevent them from becoming a new danger. When war ceases to exist between the belligerent states, there is no longer any reason for holding prisoners in captivity; when their functions as soldiers have terminated, that is when the war is finished."

The liberal and humane views expressed by Rousseau as to the true status of prisoners of war under the law of nations slowly passed into the practice of warfare in modern Europe; but it remained for Prussia and the United States, two new members of the family of nations, to give conventional form to the first humane requirements in respect to the treatment of this helpless and unfortunate class: these will be found in Article XXIV of the treaty of September 10, 1785, with Prussia,⁷ which was renewed, without limit as to its duration, in the subsequent treaty of July 11, 1799 between the same Powers. It is interesting to note that this instrument antedates, by almost exactly a century, the

⁶ Montesquieu, *Esprit des lois*, liv. XV, ch. II.

⁷ Malloy's *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers*, 1776-1909, Vol. 2, p. 1484.

adoption of the Hague Convention of 1899. The treaty of 1785 provides as follows:

And to prevent the destruction of prisoners of war, by sending them into distant and inclement countries, or by crowding them into close and noxious places, the two contracting parties solemnly pledge themselves to each other and to the world that they will not adopt any such practice; that neither will send the prisoners whom they may take from the other into the East Indies, or any other parts of Asia or Africa, but that they shall be placed in some part of their dominions in Europe or America, in wholesome situations; that they shall not be confined in dungeons, prison-ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs; that the officers shall be enlarged on their paroles within convenient districts, and have comfortable quarters, and the common men be disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for their own troops; that the officers shall also be daily furnished by the party in whose power they are with as many rations, and of the same articles and quality as are allowed by them, either in kind or by commutation, to officers of equal rank in their own army; and all others shall be daily furnished by them with such ration as they allow to a common soldier in their own service; the value whereof shall be paid by the other party on a mutual adjustment of accounts for the subsistence of prisoners at the close of the war; and the said accounts shall not be mingled with, or set off against any others, nor the balances due on them be withheld as a satisfaction or reprisal for any other article or for any other cause, real or pretended, whatever; that each party shall be allowed to keep a commissary of prisoners of their own appointment, with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him; but if any officer shall break his parole, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual officer or other prisoner shall forfeit so much of the benefit of this article as provides for his enlargement on parole or cantonment. And it is declared, that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations.

This treaty seems to have been drawn at The Hague. Prussia was represented by Baron de Thulemeier, its envoy to the United Nether-

lands. The negotiators in behalf of the United States were John Adams, Thomas Jefferson, and Benjamin Franklin. It is sufficient to say of the article already cited that, after a century of conventional endeavor, it still marks the highest point yet reached by the positive or conventional law of nations in respect to the treatment of prisoners of war. The Hague Conventions of 1899 and 1907, humane and liberal as they are, are still wanting in completeness when compared with the century old standards which are contained in the treaty of September 10, 1785 — an undertaking concluded nearly four years before the adoption of the Federal Constitution.

During the first half of the nineteenth century occasional attempts were made by a number of European states to provide for the care and safe-keeping of prisoners of war by executive regulations. These were satisfactory but to some extent incomplete and, as a consequence, most of them were extensively revised during the last quarter of the nineteenth century. In this work the United States has taken an honorable place. In the Rules for the Government of Armies in the Field, which were prepared by Dr. Francis Lieber in 1863 at the request of President Lincoln, we have the first substantial body of regulations covering the treatment of prisoners of war. In Dr. Lieber's famous work the term "prisoner of war" is defined; the persons or classes of persons who may be made prisoners are described; rules for their treatment are provided and their status is clearly stated. In this connection he says:

A prisoner of war, being a public enemy, is the prisoner of the government and not of the captor. No ransom can be paid by a prisoner of war to his individual captor or to any officer in command. The government alone releases captives, according to rules prescribed by itself. Prisoners of war are subject to confinement or imprisonment, such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

The efforts of Dr. Lieber were so far in advance of the times that the conferences at The Hague, held over a generation later, could only approve and adopt his work, without adding materially to its humane requirements.

In the development of his subject M. du Payrat first endeavors to

explain who may be made prisoners of war. The generally accepted definitions are by no means satisfactory, being deficient, as a rule, in their descriptions of the several classes of persons who may lawfully be reduced to captivity; for the right is not restricted to combatants, so called, who are taken in arms, but includes members of the staff and intendance, and of the auxiliary services who habitually accompany armies in the field. The liability to capture also extends to the sovereign, or chief executive, to members of the royal family, ministers of state and the higher grades of employment in the administrative branches of the government; this upon the ground that their services, though strictly not those rendered by combatants, are of the highest value to the belligerent government, which would be correspondingly embarrassed and inconvenienced by their capture.

Where an individual is made a prisoner of war, either by capture or surrender, he becomes vested with certain rights the extent and character of which will presently be explained; but these come into operation only in the case of one whose status, at the time of capture, is such as to entitle him to the privileges and immunities of a prisoner of war. This is important because there are many persons who may be deprived of their liberty in time of war who are not entitled to consideration as prisoners of war. The spy, for example, even though a combatant, as in the case of Major André, is not entitled to the privileges of a prisoner, nor is one who refuses to give quarter, or one who has committed a crime against the army or government of his captor. One who assists the enemy by acting as a guide, to the detriment of his own country and its army, is not entitled to consideration, and the same is the case with the bearer of despatches who resorts to fraud or deceit in order to execute his mission. The bearer of a flag of truce who takes advantage of his privilege to gain surreptitious information as to the operations or intentions of the enemy is assimilated to a spy and denied the treatment habitually accorded to prisoners of war.

Great sympathy was felt toward Major André by American officers, some of them high in the counsels of General Washington, but no exception was made to the application of the penalty. A case in some respects similar arose during the operations in Manchuria in 1904. Several Japanese staff officers penetrated the Russian lines, in disguise,

for the purpose of obtaining information; they were captured by Cosacks but, upon being interrogated, remained silent and made no attempt to exculpate themselves or to explain their situation. Some generous Russian officers, impressed by the courage and patriotic devotion of one of these officers, desired to save his life. If the prisoner had said that, on quitting the Japanese lines, he had worn his proper uniform, or that the boxes containing it had gone astray, his execution might have been avoided; but the unfortunate Samurai did not wish to accept life as a charitable gift and replied, "I am a spy, get through with it quickly." It is thus seen that "international law makes no distinction between the spy who is actuated by patriotic motives and one who acts from a desire for gain; both are equally dangerous. We may respect the one and despise the other, but we shoot both."⁸

To the classes already named must be added simple deserters, or refugees, who desire to escape further military service, and deserters to the enemy, whose intention is to repudiate their former allegiance and take service with the opposing belligerent. The former are cowards and the latter are traitors, but both are on precisely the same footing when they present themselves at the outposts of the enemy, who is under no obligation to receive them. In point of fact, however, they are generally received and, in a majority of cases, are placed upon the footing of prisoners of war; the theory being that defections from the enemy may be encouraged, as they tend to deplete his strength and impair the *morale* of his combatant forces.

There are certain limits of time and place which surround and regulate the capture of prisoners of war. In point of time, captures can only be made after the status of belligerency has been determined, either by a formal declaration of war or by an unequivocal act of hostility committed by one state to the detriment of the other. Before the date so established a state of war does not exist and no acts of war can lawfully be done. In respect to place, captures can only be made lawfully in the territory of the captor or that of the enemy — never in the territory of a neutral. The operations in Manchuria are an apparent exception to this rule, but Corea was in the protection of Japan and Manchuria was in the actual occupation and administration of Russia, and

⁸ Commandant Guelle, *Lois de la Guerre*, Vol. 1, p. 126.

each Power regarded its resort to hostilities as an act of legitimate self-defense. If the Imperial Government of China objected to the occupation of its territory, it was either unable or unwilling to cause its territorial sovereignty to be respected. Captures may also be made on the high seas or in the waters of either belligerent, but not in the territorial waters of a neutral.

One becomes a prisoner, if a member of an organized body, when the capitulations or agreement to surrender have been entered into. If captured as an individual, he passes to the status of a prisoner of war when his resistance ceases and he does some unequivocal act indicative of his desire to surrender. After such an act has been performed he can no longer engage in acts of hostility, or does so at his peril. He also becomes the prisoner of the enemy state and not of his individual captor, who has no further control over him save to place him in proper custody, and who becomes charged with his protection at the instant of capture.

There is no general agreement as to what act or gesture on the part of a prisoner shall be held to indicate his desire to surrender. Throwing down his arms or raising his hands to show that he is without arms have long been regarded as evidences of submission, but they are not universally recognized. When the wide differences of language and national or racial customs are considered, it is not surprising that no agreement in this regard has yet been reached. During the Russo-Japanese War a number of Russians sought shelter in a native hut in the town of Te-lis-se in Manchuria. The thatched roof of the hut caught fire and its occupants, desiring to surrender, thrust a white cloth through the door to make known their intention to the enemy. The Japanese regarding it as evidence of a desire to surrender, beckoned the Russians to come forth. Unfortunately the Japanese gesture of approach is precisely the same as that which among Russians signifies to withdraw, or go away. Upon this the Russians hesitated to come forth, whereupon the Japanese, seeing that their gestures had been misunderstood, made their meaning clear by drawing out each Russian by the hand and placing them in proper custody. While the Russian and Japanese armies confronted each other on the Scha-ho, a Russian deserter approached a Japanese sentinel, embraced him and kissed him on the cheek. The

Japanese, unaware of the fact that such a gesture is an evidence of sympathy or affection among European peoples, drove him away with his bayonet. The Russian fled, but returned a few moments later and grasped the sentinel effusively by the hand. The Japanese soldier then understood that his enemy wished to surrender and conducted him to headquarters.

If a right to make prisoners in time of war vests in a belligerent, does a corresponding right exist to refuse to make captives of individuals who have ceased their resistance and have indicated their desire to surrender? In other words, can a belligerent refuse quarter to persons in the service of the enemy. The question is an old one but will not detain us long. The word "quarter" originated in a practice, at least as old as the Middle Ages, by which a defeated enemy asked sanctuary in the castle or "quarter" of his opponent, and the granting of the request involved the detention of the prisoner in the stronghold of his captor. It is now generally conceded by text-writers of authority that a belligerent is no longer permitted to refuse quarter to his enemy; that is, to declare in advance that he will make no prisoners; but this statement is qualified by so many exceptions, some of them necessary, as to leave the reader in doubt as to the extent of its operation. It may safely be said, however, that in the actual operations of war the acceptance of an individual surrender is the general rule. Some individuals of semi-civilized races cannot always be prevented from attempting the lives of their captors after their resistance has been apparently overcome; others resort to ruses, such as shamming death, in order to continue a hopeless contest. Such instances occurred in the Omdurman campaign of General Kitchener. In cases of this sort, prisoners are frequently not taken—not from any want of humanity on the part of the captor, but because they refuse to surrender. The belligerent has the indubitable right to inflict upon his enemy so much injury, and no more, as will place him *hors du combat*; it has been seen that there are circumstances in which that end can only be attained by putting him to death; a course justified by the rules of war, which make it the first duty of a belligerent to secure his own troops from treacherous attacks.

It is proper to say a word at this point as to the relation of the prisoner of war to his own government. As a result of his capture he has ceased

to be a combatant and is no longer useful to that government in its military operations. If his capture was not the result of his cowardice or negligence, the fault is certainly not his. The case is otherwise, however, where he has repudiated his military obligations, or has failed in his duty to his country, or to the flag under which he serves. Much has been said on this subject, which is discussed at some length in the military regulations of the states of continental Europe. As to these, it is sufficient to say that they establish a standard of conduct for soldiers which is difficult, if not impossible, of attainment, and that the result of their enforcement would be to swell the death rolls without contributing to the success or efficiency of their military operations.

Although every consideration of honor and duty demand that the soldier should never acknowledge himself conquered, and that he should die rather than surrender, those charged with the preparation of military regulations have never been able to state the rule in such extreme terms, nor is such a rule followed in modern warfare. It is perhaps enough to say on this point that the presumption is against the individual who surrenders, and it is upon him to show that, before yielding, he had exhausted all the means of defense at his disposal, and had done all that honor and duty required to prevent his falling into the hands of the enemy. Such would be the case, for example, with a soldier who receives a disabling wound, or falls into an ambuscade, or is struck down by stealth while on outpost duty. It need hardly be said that, when troops are surrendered by their proper commander, the responsibility for the disaster is with him; and it is for him to show that his surrender was commanded by imperative military necessity, or was compelled by the troops under his command, in which case a severe punishment is imposed upon the offenders, who are guilty of an act of mutiny — one of the most serious offenses known to military law, which is everywhere punished with death.

As an immediate result of his capture, a prisoner surrenders his arms, horses and any public property or papers which are in his possession, and the same is true of any public funds that may be found upon his person at the instant of his capture. His sword he is usually permitted to retain and, if he is deprived of it temporarily, it is deposited, subject to his order, at the camp of detention. All other private property,

including money, clothing, personal belongings, and the like, is not disturbed, and, if need be, is protected by his captor. Any attempt to deprive a prisoner of articles of private property would constitute a serious violation of the requirements of the Hague Conventions and would incur the just condemnation of the civilized world. Robbery and pillage are forbidden, as are brutality and the imposition of physical torture or bodily suffering of any kind. A prisoner is entitled to and must receive humane and considerate treatment at the hands of his captor. The individual by whom the capture has been effected has neither voice nor authority in the matter, as the captive is the prisoner of the state, and not of the individual captor. A prisoner, if questioned on the subject, must give his true name and rank in the army in which he serves, but his adversary may not compel him to disclose any information in respect to that army or its operations or movements.

After prisoners have passed into the custody of the enemy, they are collected in a secure place in rear of the lines of battle, where they can easily be controlled and where the prospect of their recapture is at a minimum. The officers, who are no longer permitted to exercise command, are separated from the enlisted men, and are disarmed and deprived of any articles of public property which may remain in their possession. Rolls are prepared, from which individual cards of identity are made for the use of the Bureau of Information of Prisoners of War. A similar course is pursued toward the enlisted men. It is at this stage of their captivity that their hardships really begin. Few belligerents are provided with considerable supplies of food in the immediate vicinity of the field of battle, and any scarcity in that regard is instantly felt by the prisoners. They have been violently deprived of their liberty, and the articles of camp equipment which are absolutely necessary in active service in the field, such as blankets, extra clothing, food and cooking utensils, have been lost, or have been taken from them in the confusion of battle; so that to the immediate insufficiency of food is added the want of clothing and camp equipage. It is from these deprivations that officers especially suffer. Troops in the field habitually carry on their persons only articles of prime necessity; if but one of these is lacking, considerable inconvenience ensues; if all are lost, as is too frequently the case, immediate and serious hardship results.

So soon as the prisoners have been collected and divided into detachments, escorts are provided of sufficient strength to prevent attempts at escape, and nominal lists of the members of each detachment are also prepared. The first stage of the journey to the detention camp is covered by marching, as all rail and water communications in the immediate vicinity of the army are needed for strategic purposes and for the movement of troops, ammunition and supplies: trains in the reverse direction being used largely by the sick and wounded, who require extensive accommodation while travelling by rail or boat toward the base hospitals in rear of the army. At the end of this stage of the journey accommodations by rail or steamer are provided in which the camp of detention is finally reached.

The amount and character of the shelter provided at these camps, where existing buildings are not used, depend to some extent on the climate, the season of the year, and upon the amount of care and fore-thought shown by the belligerent captor in making preparations for the reception of prisoners. The Hague treaty requires that each prisoner of war shall receive the same quarters, rations and other similar allowances to which enlisted men are entitled in the army of the captor. This arrangement is a liberal one upon its face, but it fails in practice not infrequently and furnishes ground of complaint on the part of prisoners of war, whose ideas of a proper dietary differ materially from those of their captors. A ration of rice accompanied by a little meat or fish, which is sufficient for the somewhat ascetic Japanese, would hardly meet the needs of the Russian soldier who is accustomed to a large and filling ration of stewed meat, vegetables and tea; similarly, the daily allowance of food to a French or German soldier would not be equal to the needs of an American, being deficient in quantity, from his point of view, and unattractive in the character of its components. A belligerent, however, can hardly be expected to incur greater expense on account of his prisoners than he finds adequate to the support of his own soldiers. The morning after the battle of Mukden some captured Russian officers complained to the Japanese officer in charge of prisoners of the lack of warm clothing and of the insufficient food that had been served out to them. For reply the Japanese produced his allowance of food for breakfast, which consisted of a small quantity of rice with

a few morsels of meat and a single salted prune; he then opened his tunic and showed them the single flannel undergarment that the regulations permitted him to wear on active service.

The character of the restraint that a belligerent may impose upon prisoners of war is described in the Hague Conventions of 1899 and 1907 by the word "internment." This term applies to the place of residence assigned to a prisoner by his captor, in which his movements are observed and supervised by superior military authority. Towns and fortresses may thus be assigned to prisoners as places of internment, and garrisons are maintained at sufficient strength to prevent escapes and exercise an efficient police control in case of disorder. Otherwise the prisoners may move about freely within the limits of internment that are assigned them, and no confinement or other restraint is imposed save in the event of disorder or of an attempted escape. It is the duty of a prisoner of war to escape whenever an opportunity presents itself that offers a reasonable prospect of success: it is equally the duty of the captor to prevent escapes, and to render combinations to that end abortive. Hence it is that the extent and character of the restraint that a belligerent may impose is measured by the chance of escape. The prisoner of war has committed no penal offense in defending his country, so that the restraint imposed cannot be in the nature of punishment for crime. Prisoners may not be put in irons, or confined in cells save with a view to prevent escape or by way of punishment for a criminal offense.

As an officer who has become a prisoner of war has been separated from his men, he is for that reason incapacitated from the exercise of military command among his fellow prisoners, and the active supervision passes to officers of the captor state, who are charged by their own government with the custody and control of prisoners of war. It has been seen that the officers and men are separated from each other and are subjected to different systems of military control. Soldiers are furnished with rations in kind but, as officers cannot be conveniently subsisted in that way, the Hague treaty contains the humane requirement that they shall receive the same pay and allowances as officers of equal grade in the army of the opposing belligerent. The advances so made are reimbursed by the prisoner's government at the close of the

war. The Japanese, seeing that the Russians held by them in captivity could hardly subsist on the meagre diet issued to their own officers and men, made a daily allowance of 60 yen to officers and 30 yen to enlisted men who were held by them as prisoners of war—an allowance nearly double that furnished to their own personnel. This was an act of great generosity which, I believe, has not been surpassed in the history of modern war.

The status of a prisoner of war may be terminated in several ways, as by death, recapture, ransom or escape. It may also be terminated by exchange. Exchanges are conducted in accordance with agreements, called "cartels," which are entered into by the commanding generals of the belligerent armies. There are instances in which the opposing governments have prohibited exchanges of prisoners on the ground that the necessities of the war were better served by retaining prisoners in captivity than by allowing them to rejoin their own army in the operation of an exchange. These cases, however, are extremely rare. In making exchanges, the variations of military rank are provided for by a scale of equivalents, in which the exchange values of officers and non-commissioned officers are expressed in terms of private soldiers. Equivalents in disability are also considered, although the operation of the Geneva Convention is to withdraw the sick and wounded from the operation of ordinary exchanges and place them in a class apart. The status of the sick and wounded who fall into the hands of the enemy is that of prisoners of war. In any case, when the exchange has been completed, the former prisoner is at liberty to rejoin his colors and to resume hostilities as an ordinary combatant.

Ransom is one of the oldest methods of terminating the captivity of a prisoner of war, although it has practically disappeared as a method of securing the release of an individual captive. It was authorized, however, by the War Department of the United States so recently as 1863 as a somewhat desperate means of obtaining the freedom of the officers and men of the Union Army who were held in captivity by the Confederate Government. In its earliest form it consisted in the payment of a sum of money to the captor, in virtue of which the life of a prisoner was spared and he was allowed to return to his own lines. As the captor was unable to guarantee the life of his prisoner, after he had passed

out of his hands, and as the captor's government did not appear in the transaction, the benefit of the ransom was inconsiderable, unless the captor was sufficiently powerful to protect his prisoner, or was able to secure his return to the lines of his own army. Fabius released 1700 prisoners who had been captured at Perugia in the Samnite Wars nearly three hundred years before Christ, in consideration of the payment of 310 asses. The city of Palermo was captured by the Romans in 254 B.C. and its garrison regained their liberty by the surrender of two silver mines. Hannibal vainly offered a large ransom for the release of the Carthaginian prisoners taken at Cannæ. In the Middle Ages the ransom of John the Good was fixed by the English at a sum equivalent to forty-nine millions of our money.⁹ Richard Cœur de Lion, a prisoner in the hands of the Duke of Austria, obtained his freedom at the price of 250,000 golden marks, while Du Guesclin was forced to rely upon the woolen thread, spun by the women of France, to assist in the payment of the ransom imposed upon him by the English.

The rate of ransom varied from age to age, a year's pay being perhaps a fair average. Gentlemen who served without pay, under some sort of feudal obligation, were obliged to surrender a year's income of their respective fiefs. The Dey of Algiers in 1737 demanded 1,000 pistoles for an ordinary captain, 5,000 for an officer of greater rank, and 100,000 for each of two Knights of Malta. A year later, the market for prisoners being somewhat overstocked, officers were released on payment of 600 pistoles, and two Knights of Malta were set free, one at 22,000 pistoles and the other at 6,000. The Church continued its praiseworthy efforts to secure the release of Christians in infidel hands; an order known as the Trinitarians having been established with a view to secure their enlargement. It has been seen that the practice of ransom retained its vitality largely because it was paid to the individual captor. This practice seems to have come to an end in the early part of the seventeenth century and had practically disappeared at the close of the Thirty Years' War. Thenceforward, prisoners captured from the enemy passed from the custody of individual captors into the hands of the state and questions of ransom were determined by the belligerent governments. Those who were fairly captured in battle were ransomed by their governments,

⁹ Francs of current value and purchasing power.

leaving those who lost their liberty under less creditable circumstances to the operation of private ransom.

In the sixteenth and seventeenth centuries, soldiers were to a great extent under the control and proprietorship of their captains, who were expected to secure their release, by ransom or otherwise, in the event of their falling into the hands of the enemy. If a captain failed in that regard it was possible for a rival to obtain ownership of the company by ransoming its members. Louis XIV was the first European monarch to question the propriety of making the liberty of his subjects a matter of contractual obligation. As a result, ransom contracts steadily diminished in frequency, until the revolutionary government of France set the example of repression by a law of May 23, 1793 in which the payment of ransom was forbidden. Since that date ransom has only been resorted to with a view to obtain the enlargement of captives held as prisoners by semi-civilized races of which the Mohammedan peoples inhabiting the south coast of the Mediterranean are examples. The case of Ion Perdicaris, an American citizen, who was captured by Raisuli, a Morrocan bandit in 1904 and whose liberty was secured by the Government of the United States in 1904, by the payment of a considerable sum by way of ransom, indicates that the practice of ransom, certainly in such cases, is not quite extinct.¹⁰

The status of an officer held as a prisoner may be modified by his enlargement on parole, which is a written instrument in which in virtue of a promise not to pass certain specified limits, the rigor of his captivity is considerably diminished. In some cases the officer is permitted to return to his home upon his parole of honor not to take up arms until regularly exchanged. These instruments are strictly construed, and one who violates their terms is severely punished; in minor matters, by a revocation of the privilege of the parole; in extreme cases, in which a prisoner is found in arms without having been exchanged, the death penalty may be imposed. The privilege of the parole is restricted to commissioned officers, and they are given by enlisted men only in exceptional circumstances. Where it is necessary to release organized bodies of enlisted men on parole, the promise is habitually given in their behalf by their immediate commanders. Such was the case with the army of General

¹⁰ See Foreign Relations of the United States, 1904, p. 496.

Pemberton which surrendered at Vicksburg, Mississippi, in July, 1863. At the surrender of the Confederate army at Appomattox Court House in April, 1865, a written instrument was furnished to each officer and enlisted man of General Lee's army with a view to his identification and protection under the agreement of surrender. While the giving of a parole is generally discretionary with the officer, a belligerent may forbid its officers to give their paroles to the enemy. It may also decline to accept them from the enemy in any case, or from certain officers of the opposing belligerent. Paroles given in violation of such orders are without validity.

The practice of giving employment to prisoners of war, although of long standing in continental Europe, has not been uniformly followed and, for that reason, has stood in considerable need of conventional revision. This it received at the hands of the conferences at The Hague in 1899 and 1907. It was the purpose of these undertakings to give uniformity to the conditions of employment, which was already recognized to some extent by the practice of nations. These conditions were made the subject of careful study by the conferences, and regulations were formulated covering the character and amount of work done, whether for the public or for private individuals, and the compensation allowed. The rules adopted apply to enlisted men alone, no labor, except of a voluntary character, being required of commissioned officers. Prisoners may be engaged in the construction of roads, canals, or other undertakings of a public character; and they may also be employed in the harvesting of crops and in the prosecution of manufacturing industries, but their labor can have no direct connection with the belligerent activities of the enemy who holds them in custody. The compensation allowed is applied, in part to their support, and in part to their individual expenditures.

One of the most distressing incidents in the captivity of a prisoner of war is the uncertainty of his fate during and subsequent to his capture in battle. The Conference of 1907 supplemented the requirements of the earlier treaty and furnished a complete and appropriate remedy to this condition of affairs by a provision calling for the establishment of bureaus of information by each belligerent in connection with the prisoners under his control. It is made the duty of this bureau to col-

lect all information in respect to prisoners in its custody, including date and place of capture, condition in regard to wounds, sickness or health, together with all subsequent individual happenings, and the bureau is also required to furnish this information upon the request of those immediately interested. Letters and presents intended for prisoners are transmitted through the same channel, which charges itself with their prompt and regular delivery. It is in co-operation with this bureau that the work of the relief societies is carried on. Wherever prisoners may be, on the battlefield or in its immediate vicinity, in their places of internment or while en route to the places designated for their exchange, the benevolent activity of these societies continues and is allowed full play by the belligerent under whom they are acting, greatly to the comfort and convenience of the unfortunates in whose behalf they are put forth.

It is a tribute to the efficiency of the work accomplished by the peace conferences at The Hague that these humane requirements have been made a part of the conventional law of nations. In the Russo-Japanese War the operations of the bureaus were most successful, under conditions of great apparent discouragement. The belligerents spoke different languages and their national customs and traditions had but little in common; but they were animated by a single desire to obtain the utmost benefit from the clauses of the treaty providing for the beneficent activity of the bureaus of information. The Japanese Government was especially interested in the successful operation of the new instrumentality and remitted no endeavors that were calculated to secure its efficient operation. The same may be said with equal truth of the officers who gave effect to its requirements in behalf of the Imperial Government of Russia. The results were surprising. Individual cards were kept of the Russian prisoners on which their condition as to sickness and health were noted from time to time, with the dates and places of capture; and these were freely placed at the disposition of the Russian Commission. When the difficulties, linguistic and racial are considered, which were encountered by the belligerents in this desperate struggle — and successfully overcome, no civilized nation can afford to be less prompt and efficient in the collection and transmission of information in respect to any prisoners that may fall into its hands in the wars of the future.

As the status of a prisoner of war is one which can only legally exist in time of war, it should terminate with the treaty of peace which brings hostilities to a close. In fact such is the habitual practice of belligerents. But difficulties are encountered, at times, growing out of the disparity in the numbers of prisoners held by the opposing belligerents, or the distance of their places of internment from the frontier, and these have operated in the past to cause some delay in the repatriation of the prisoners. Such obstacles were encountered at the close of the Franco-Prussian War in 1871, when 363,000 French prisoners were interned in German territory at a considerable distance from the theatre of war. The trains bringing back French prisoners were used for the gradual evacuation of the French provinces by the German troops — all this with a view to the prompt repatriation of the French prisoners within the shortest practicable limits of time. The work was delayed for a time owing to the establishment of a revolutionary government in the city of Paris on March 18, 1871, which might have made it necessary for the evacuation of France to be desisted from, and for hostilities to be resumed on the part of the Germans. These difficulties were met and overcome by the German Government and the repatriation of the prisoners was resumed and completed to the mutual satisfaction of the governments interested. The repatriation of 80,000 Russians, at the close of the war between Russia and Japan, was carried out by the Japanese Government with the greatest dispatch. Mutinous uprisings took place on board some of the Japanese transports that conveyed the Russian prisoners to Vladivostok, but were suppressed with but little difficulty. These grew out of Russian conditions and had nothing to do with the treatment of the Russian prisoners in Japan.

M. du Payrat discusses with great fulness the efforts put forth by the great European Powers from time to time with a view to improve the condition of prisoners of war, and to secure greater humanity and uniformity in their treatment. His presentation of the case makes it clear that an attempt to remedy these conditions by the efforts of the separate Powers was doomed to failure. This was shown during the Franco-Prussian War in 1870 and, in a less degree, during the Russo-Turkish War of 1877. The situation was one that could only be remedied by an exercise of the treaty-making power, and this will be found

in the regulations for the conduct of warfare on land which were adopted by the peace conference of 1899, as subsequently amended, in some important particulars, by the conference of 1907 at The Hague.

Material improvements in the treatment of captives were provided for in both instruments, especially in respect to their support, the extent and character of the restraint that may be imposed, the conditions of their internment in neutral territory, and their final enlargement and repatriation. The various requirements of the treaty were subjected to a powerful strain during the Eastern War of 1904, but they were found to be easily possible of execution, provided the belligerents were actuated by a reasonable desire to carry them into effect. It only remains for the states that were signatory parties to those instruments to see to it that the terms of the conventions are fully understood by the persons composing their military establishments, that instructions in uniform furtherance of their requirements are adopted, and that adequate provision for the care and support of prisoners is made in advance of their capture or surrender.

It is a fortunate circumstance that one of the most intricate and difficult subjects that comes within the operation of the law of nations should have been made the subject of study and elaboration by one so fully versed in its practical operation. The history of its development is thoroughly treated after a close study of authorities, many of which are not accessible to American students; the practical application of the rules of war applicable to the subject is discussed with equal fulness and ability; a careful study of M. du Payrat's excellent treatise leaves in the mind of the reader a profound admiration for the ability, liberality and impartiality with which the work has been performed. It would be well if those charged with the military preparations of the United States could be made familiar with its contents.

GEO. B. DAVIS.

THE HUDSONIAN SEA IS A GREAT OPEN SEA¹

As a result of the continual development of the northwest provinces of the Dominion of Canada, the railroad is advancing slowly closer and closer to the Hudsonian Sea. The Canadian Northern Railway aims to extend its system to Port Nelson,² and the Grand Trunk Pacific Railway proposes to build a line to Fort Churchill,³ both suitably protected harbors on that great sea. If during a short portion of the year the bread-stuffs harvested in Saskatchewan and Alberta could be transported to either or both of these points on the Hudsonian Sea, and then by steamer to Liverpool or some other European port, the length of the route between the northwest prairies of Canada and the markets of Europe would be considerably shortened. In connection with the project to use the great Hudsonian Sea, named in honor of its discoverer, Henry Hudson, as a way to carry from Canada to Europe the food supplies that the former has for sale, a growing desire has been manifested in the most prosperous of the colonies of the British crown within the last twenty years to modify the legal status of the waters of that large body of salt water from an open sea to a closed one. Within the last few years reports have appeared from time to time in the newspapers that the Dominion of Canada, in order to accomplish this legal transformation, was quietly preparing and executing plans whereby in the near or distant future, as events might warrant, a plea could be maintained with success that that great sea was a closed sea of Canada on the theory of the "historic bay" doctrine. Support is given to these statements and rumors in the last edition of the *Encyclopaedia Britannica*, published in 1910,

¹ This article is largely though not exactly an English version of Mr. Balch's paper, *La baie d'Hudson est une grande mer ouverte*, which was published in the REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, Brussels, 1913, Vol. XV, new series, pp. 153-172.

² *The Commercial and Financial Chronicle, Railway and Industrial Section*, New York, February 22, 1913: Map of The Canadian Northern Railway, February 22, 1913, p. 23.

³ *Ibid.*, Map of the Grand Trunk Pacific Railway, February 22, 1913, p. 58.

where it is stated that Canada on account of the whale fishery is anxious to declare the Hudsonian Sea a *mare clausum*.

In considering such a possible contention on the part of the Dominion of Canada, the generally accepted form of the name of that great North American sea, Hudson's Bay, should not be allowed to obscure the facts as to the size and nature of that large body of salt water.

Hudson's Bay⁴ or Sea is about four times as large as Great Britain,⁵ more than twice as big as either France⁶ or Germany,⁷ and five times greater than the States of Pennsylvania and New York combined.⁸ Thus it is at once apparent that in spite of its being called generally a *bay* it is a sea of large proportions. The well-known French geographer, Elisée Reclus, in his *Nouvelle Géographie Universelle* recognizes this fact. In his descriptive account of the Hudsonian Sea he begins by saying: "Hudson's Sea, generally designated under the altogether erroneous name of a 'baie,'" etc.⁹ Again, upon a map of the Hudsonian Sea he marks, "mer de Hudson,"¹⁰ and on a map at the end of the same volume, in which he gives all of the Dominion of Canada as well as Alaska, Newfoundland and the upper half of the United States, Reclus inscribes likewise on the Hudsonian Sea the title, "mer de Hudson."¹¹ More than this, however, Hudson's Bay is in area much larger than many of the European seas which formerly were considered, and effectively were, closed seas, but which are now universally recognized as forming part of the open sea.

The Hudsonian Sea, according to Dr. Hugh Robert Mill, a member of the Royal Geographical Society of England, has a size of 1,222,610 square kilometers.¹² The same learned geographical author credits the

⁴ The *Encyclopaedia Britannica*, 11th ed., Vol. XIX, p. 974.

⁵ *Ibid.*, Vol. IX, p. 408, Vol. XIV, p. 742, Vol. XXIV, p. 412.

⁶ *Nouveau Larousse illustré*, the article entitled *France*.

⁷ *Ibid.*, see the article entitled *Allemagne*.

⁸ *The New International Encyclopaedia*, New York, 1907, see the articles entitled *Pennsylvania*, and *New York*.

⁹ Elisée Reclus, *Nouvelle Géographie Universelle*, Paris, 1870, Vol. XV, p. 377. The original French of Reclus follows: "La mer de Hudson, généralement désignée sous le nom tout à fait impropre de 'baie,'" etc.

¹⁰ *Ibid.*, p. 379.

¹¹ *Ibid.* This map is entitled, *Amérique Boréale*, 1890.

¹² *Encyclopaedia Britannica*, Vol. XIX, p. 974.

Mediterranean Sea with an area of 2,967,570 square kilometers; the Baltic with 406,720 square kilometers; the Red Sea with 458,480 square kilometers; the Bering Sea with 2,274,800 square kilometers; the Okhotsk Sea with 1,507,610 square kilometers; the North Sea with 571,910 square kilometers; the Irish Sea with 213,380 square kilometers; and the Laurentian Sea with 219,300 square kilometers. The German geographer, Karstens, estimates that the Adriatic Sea has 130,656 square kilometers. In the *Nouveau Larousse* the area of the Black Sea is given as 382,843 square kilometers.

From the foregoing figures, it is clear that the large body of water called Hudson's Bay ranks in size next to the Mediterranean, Bering and Okhotsk seas. It is twice and a half times as large as the North Sea, three times the size of the Baltic Sea, about six times the area of the Laurentian Sea, popularly known as the Gulf of St. Lawrence, more than nine times the size of the Adriatic Sea, and over five times as large as the Black Sea. So while this great body of salt water in North America is called in general a *bay*, yet it is larger, generally much larger, than other sinuosities of the ocean that advance far into the continents of the old world, and are as much surrounded by land as it is, but which are designated as *seas*. The name *Hudson's Bay*, consequently, should not mislead us into forgetting that it is really a large sea that bears the name of that hardy English navigator who, sometimes sailing in the service of his own country, sometimes in that of the States-General of the Netherlands, carried both the English and the Dutch flags into the New World, and by so doing gained a lasting place upon the map of the world for his own name in the majestic river that flows by the former city of New Amsterdam, now New York, and the great sea far towards the north opening through Hudson's Strait and Davis Strait into the Atlantic Ocean.¹³

Especially, however, a comparison of the size and legal status of Hudson's Bay with the Gulf of St. Lawrence are instructive and illuminative as to any exclusive pretensions of Canada over the former. As has been stated above, the area of the Hudsonian Sea amounts to 1,222,610

¹³ G. M. Asher of Heidelberg, *Henry Hudson the Navigator*, Brooklyn, 1867; Justin Winsor, *Narrative and Critical History of America*, New York and Boston, 1884, Vol. III, pp. 92-93; Christopher Columbus, New York, 1892, p. 650.

square kilometers, while that of the Gulf of St. Lawrence measures only 219,300 square kilometers. Both these seas are entirely surrounded by lands of the British Empire, the former exclusively by Canada, the latter by the Dominion and Newfoundland. The Hudsonian Sea has a connection with the ocean that is not less than forty-five miles wide and generally more than double that width. The Laurentian Sea, in addition to the passage between Labrador and Newfoundland through the Strait of Belle Isle, which is about ten miles across, is joined to the Atlantic Ocean by Cabot Strait, which is sixty miles wide. This is not only ten times the usual six-mile measure as to whether bays are territorial or not in their entirety, but, also, in addition, the *thalweg* of Cabot Strait is consequently far beyond the reach of shore batteries. It was recognized as an open sea by the treaties of 1783 and 1818 between the United States and Great Britain, and in the North Atlantic Coast Fisheries Arbitration case, submitted to and argued before the bar of The Hague International Judicial Court in 1910, the Gulf of St. Lawrence was recognized by implication as an open sea by all parties concerned. It has been so regarded from time immemorial by the nations of the world.

In an article on *The St. Lawrence* in the British magazine, the QUARTERLY REVIEW, for April, 1912, it is said that "the entire mouth of the St. Lawrence could easily contain the whole of the British Isles."¹⁴ But the Hudsonian Sea would contain them far more easily. In how, then, does Hudson's Bay differ from the Gulf of St. Lawrence that it should now, after it has for centuries been looked upon as forming a part of the high seas, suddenly be classed as a closed sea? Why, in view of the fact that the area of the Hudsonian Sea is five and a half times as large as the Laurentian Sea, should the former of those two seas be classed as a *mare clausum* and the latter as a *mare liberum*, when the Gulf of St. Lawrence as well as Hudson's Bay is surrounded only by land of the British Empire and by that of no other nation? If that great northern sea named after Henry Hudson is to be ranked as a closed sea, it must be so classified on some other basis than its geographical limits, unless at the same time many other seas of lesser extent are withdrawn from the ranks of open seas.

¹⁴ *The St. Lawrence*, QUARTERLY REVIEW, April, 1912, p. 400.

Since the entrance to the Hudsonian Sea through Hudson's Straits varies in width from forty-five to one hundred miles,¹⁵ many times double the width of the three-mile belt of the territorial sea, that is, six miles, Hudson's Bay or Sea forms a part of the open sea, unless from time immemorial it has been recognized as a historic British bay. But the historic facts show that the Hudsonian Sea is not one of those bays or seas bounded by the land of a single nation which have been recognized from time immemorial by the world at large as territorial in their whole area without regard to the width of their connection with the main ocean. The famous jurist, Emer de Vattel,¹⁶ in the eighteenth century specifically recognized Hudson's Bay as an open sea. In the early part of the nineteenth century two American diplomats, Albert Gallatin and Richard Rush, who negotiated on behalf of the United States with Great Britain the treaty of 1818, also recorded their opinion that Hudson's Bay is an open sea. In the first article of that treaty, defining the fishery rights of the two Powers along the northeastern American coast, it is provided that "the inhabitants of the said United States shall have forever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind, * * * and also on the coasts, bays, harbors, and creeks from Mount Joly on the southern coast of Labrador, to and through the Straits of Belle Isle and thence northwardly, indefinitely along the coast, without prejudice however, to any of the exclusive rights of the Hudson Bay Company."¹⁷ Commenting on this reservation of the rights of the Hudson's Bay Company, Gallatin and Rush say of this exception that it "applies only to the coasts and their harbors, and does not affect the right of fishing in Hudson's Bay beyond three miles from the shores, a right which could not exclusively belong to, or be granted by, any nation."¹⁸ In more

¹⁵ *The Encyclopaedia Britannica*, 11th ed., Vol. XIII, p. 851.

¹⁶ Emer de Vattel, *Le Droit des Gens ou Principes de la loi naturelle*, Amsterdam, 1775, Vol. 1, p. 142.

¹⁷ *Treaties and Conventions concluded between the United States of America and other Powers, since July 4, 1776*, Washington, 1889, pp. 415-416.

¹⁸ James Brown Scott, *Argument of the Honorable Elihu Root on behalf of the United States before the North Atlantic Coast Fisheries Arbitration Tribunal at The Hague, 1910*, 1912, p. CXV.

recent times such well known jurists as Lucchesi-Palli,¹⁹ Phillimore,²⁰ Bluntschli,²¹ Fedor de Martens,²² Rivier,²³ Bry,²⁴ Bonfils,²⁵ Chretien,²⁶ Despagnet,²⁷ Fauchille,²⁸ de Louter,²⁹ and others have held the same opinion.

Thus, for example, the French publicist, Georges Bry, writes: "Gulfs and bays of considerable extent, such as the Gulfs of the Lion and Biscay, Hudson's Bay, must be assimilated with the high seas and brought within the regime of the liberty [of the sea], reserving of course the rights of the state within the limits of the territorial waters."³⁰ Another French jurist, Henry Bonfils, after having spoken in his well-known *Manuel*, of the claims that Great Britain in past times maintained to the so called *narrow seas*, says: "These waters, like those of the Gulf of the Lion in the Mediterranean, the Gulf of Biscay, Hudson's Bay, etc., form part of the high sea."³¹

The International Law Association, which examined at its reunion in 1893 the question of the limits of territorial waters, considered not only the extent of the territorial belt along the coast lines facing the wide and open seas, but also discussed in the case of large and small sinuosities that advance into the land, when such sinuosities should be considered to be entirely within the area of territorial waters and when part of the open sea, excepting always, of course, in the latter case,

¹⁹ Le Comte Ferdinand Lucchesi-Palli, *Principes du Droit Public Maritime*, Paris, 1842.

²⁰ Sir Robert Phillimore, *International Law*, London, 1879, Vol. I, p. 284.

²¹ J. C. Bluntschli, *Le Droit International Codifié*, traduction de Lardy, Paris, 1886, sec. 309.

²² F. de Martens, *Traité de Droit International*, Paris, 1883, Vol. I, p. 504.

²³ Alphonse Rivier, *Principes de Droit des Gens*, Paris, 1896, Vol. I, p. 155.

²⁴ Georges Bry, *Droit International Public*, Paris, 1892, 2d ed., p. 207.

²⁵ Henry Bonfils, *Manuel de Droit International Public*, Paris, 1901, 3d ed., revised and brought up to date by Paul Fauchille, p. 285, sec. 516.

²⁶ Alfred Chretien, *Droit International Public*, Paris, 1893, pp. 102-103.

²⁷ Franz Despagnet, *Cours de Droit International Public*, Paris, 1894, p. 438.

²⁸ Henry Bonfils, *Manuel de Droit International Public*, Paris, 1901, 3d ed., revised and brought up to date by Paul Fauchille, p. 285, sec. 516.

²⁹ J. de Louter, *Het Stellig Volkenrecht*, The Hague, 1910, Vol. I, p. 386.

³⁰ Georges Bry, *Droit International Public*, Paris, 1892, 2d ed., p. 207.

³¹ Henry Bonfils, *Manuel de Droit International Public*, Paris, 1901, 3d ed., revised and brought up to date by Paul Fauchille, p. 285, sec. 516.

the *lisière* of territorial waters following the contour of their shores.

That learned association asked of its members, at its meeting of 1893, among other questions, information on the following point of inquiry:³²

"Particulars of claims over further parts of the sea not included ordinarily in territorial waters?"

In answer to this question, Mr. Andrew P. Gordon, a Canadian barrister, wrote as follows:

There is no act of the Dominion Government, nor, so far as I am aware, of the Imperial Parliament, having reference to any such claim, but I am strongly of opinion that the waters of Hudson's Bay, being wholly embosomed within the territory of the Dominion, should, subject to the right of innocent passage by foreigners, be claimed as territorial waters of the Dominion, the *fructus* thereof to belong to her citizens alone.

Consequently, in 1893, twenty years ago, this Canadian publicist gave it as his opinion that the Hudsonian Sea should be treated by Canada as being entirely within the territorial waters of the Dominion on the principle of *mare clausum*. At the same time it is evident, according to that same written opinion of that jurisconsult, that the Dominion of Canada up to that time had not made an official assertion of such a possible claim. The Hudsonian Sea, according to the facts as expressed by Mr. Gordon in his above cited opinion, was in 1893 a *mare liberum*. And since that time that great sea — which Bonfils, Despagnet, and many other international jurisconsults have recognized in the past as forming a part of the high seas — has not changed its legal status of being an open sea to that of a closed one.

In addition, there is also an act of a Canadian sealing vessel and a protest of the British Imperial Government, *à propos* of the extent of the territorial waters of Uruguay at the mouth of the Rio de la Plata, that supports the freedom of the waters of Hudson's Bay.³³ In 1905, the Canadian sealer, the *Agnes G. Donohoe*, chased the fur seals in the estuary of the Rio de la Plata at a greater distance than three miles

³² Association for the Reform and Codification of the Law of Nations, Fifteenth Annual Report, London, 1893, *Territorial Waters*, pp. 7-15, *passim*.

³³ *The Times*, London, March 23 and 24, 1908; Thomas Wemyss Fulton, *The Sovereignty of the Sea*, Edinburgh and London, 1911, p. 663.

from the coast of Uruguay. That sinuosity of South America is at least sixty miles wide. Nevertheless, the Government of Uruguay maintained that the territorial jurisdiction of Uruguay over the waters of that estuary extended far beyond three miles from the Uruguayan shore, and in consequence caused the *Agnes G. Donohoe* to be seized for having transgressed a presidential decree that forbade the chase of fur seals within those so-called Uruguayan territorial waters. The Canadian vessel was eventually released. But the British Government protested against the Uruguayan claim to territorial jurisdiction further "than," in the words of the London *Times* "the usual three-mile limit."³⁴ Consequently, in protecting this Canadian sealer in opposition to the presidential decree of Uruguay against seizure for having hunted fur seals in the estuary of the Rio de la Plata outside of the three-mile limit along the coast of Uruguay, but within the limits claimed by Uruguay as territorial waters, the British Imperial Government gave both sanction and support to the rights of American whalers to hunt for whales in the Hudsonian Sea, outside of the three-mile limit along the Canadian coasts.

In addition, in the article on Hudson's Bay in the well known and authoritative *Encyclopaedia Britannica*, published as recently as three years ago, though it is said that the Dominion of Canada would like to declare that large sea as territorial in its whole extent and so a closed sea, yet in that article the Hudsonian Sea is recognized as an open sea. The writer of the article says:³⁵ "The bay [i. e., Hudson's Bay] abounds with fish, of which the chief are cod, salmon, porpoise and whales. The last have long been pursued by American whalers, whose destructive methods have so greatly depleted the supply that the Government of Canada is anxious to declare the bay a *mare clausum*." Although the article is not signed by its author, it should not be forgotten that this paper is printed in a celebrated British publication, a work that always maintains to the utmost degree the renown and rights of Great Britain and the British Empire.

If Canada, however, asserts that Hudson's Bay is a *mare clausum*,

³⁴ *The Times*, London, March 24, 1908, p. 5.

³⁵ *The Encyclopaedia Britannica*, Cambridge, England, at the University Press, 1910, 11th ed., Vol. XIII.

she will go counter to the policy and arguments that she maintained with such ability and acumen twenty years ago concerning the legal status of Bering Sea. In that case the United States, wishing to protect the fur seal from extermination, attempted to prevent the Canadian sealing vessels from hunting those animals outside of the three-mile limit of American territorial waters. To justify such a policy, the United States, in the first place, pleaded before the International Court at Paris in 1893, that Bering Sea is a *mare clausum*; and, secondly, they advanced the theory that, as the fur seals when they left the ocean for land only landed on American land, the Pribiloff Islands, where their pups were born, consequently the fur seals belonged to the United States, and so were under their protection when far out at sea beyond the traditional limits of the territorial sea. Both these contentions Canada, as well as Great Britain, opposed before the International Tribunal at Paris, as being contrary to international law; and both pleas very justly were rejected by the court as unsound. By the law of nations, however, Hudson's Bay is as much a *mare liberum* as is Bering Sea. If the fur seals, even though when they leave the ocean for *terra firma*, land only on American territory, are not when they swim out beyond the conventional three-mile limit of territorial waters, under the exclusive jurisdiction of the United States, surely the whales that never land on the shore at all but remain the entire year for all the period of their natural lives in the salt water, cannot be claimed as the exclusive property of Canada when they roam beyond the limit of the three-mile territorial belt. What was sound law in the case of Bering Sea with reference to the issue raised by the possible extermination of the fur seals is also sound law when applied to the analogous case of the Hudsonian Sea with reference to the possible destruction of whales.

As it is eminently proper to protect the fur-seal life in the waters of Bering Sea by international agreement without, however, making of that large body of water a closed sea, so it would be most admirable and suitable to guard against wanton destruction of the whales that roam among the waters of Hudson's Bay through an international convention but without changing the free status of that sea.

If we look at the treatise, *International Law*, of Dr. Oppenheim, the present holder of the Whewell chair, we find that, judged by his state-

ments of the law defining what sinuosities of the ocean penetrating into the land are territorial in their entirety and what are in part portions of the open sea, Hudson's Bay is an open sea. Speaking of embayed waters, he says:³⁶

Gulfs and bays surrounded by the land of one and the same littoral States whose entrance is so wide that it cannot be commanded by coast batteries, and, further, all gulfs and bays enclosed by the land of more than one littoral State, however narrow their entrance may be, are non-territorial. They are parts of the open Sea, the marginal belt inside the gulfs and bays excepted. They can never be appropriated, they are in time of peace and war open to vessels of all nations including men-of-war, and foreign fishing vessels cannot, therefore, be compelled to comply with municipal regulations of the littoral State concerning the mode of fishing.

According to the above interpretation by Dr. Oppenheim of the law of nations, deciding what bays are and what are not entirely territorial, the Hudsonian Sea forms part of the open sea. For as the entrance to that great sea is at all points forty-five or more miles wide, the entrance cannot be controlled from the shores.

In addition to the above cited opinion, Dr. Oppenheim in his treatise specifically names the White Sea — which Russia would like to close against the fishing vessels of Britain and other Powers in favor of those of her own nationals — as an open sea.³⁷ The White Sea, a gulf of the Arctic Ocean, is a sinuosity whose shores are entirely, as in the case of Hudson's Bay, under the dominion and control of one and the same Power, the Russian Empire in the case of the White Sea, the Dominion of Canada in that of Hudson's Bay. The White Sea consists of an outer and an inner portion. The former is about 150 miles long and 75 miles wide: the latter part, which is 150 miles by 250, is separated from the outer portion by the Korridor, a strait 100 miles long and 35 miles wide. In the opinion of the learned master of the law of nations who now teaches at Cambridge University, the White Sea, as has been said above, is an open sea. As the communication from the ocean to Hudson's Bay is through Hudson's Strait, which varies in width from 45 to 100 miles, a distance always larger than the width of the Korridor of

³⁶ Lassa Oppenheim, *International Law*, London, 1912, 2d ed., Vol. I, p. 263.

³⁷ *Ibid.*, p. 322.

the White Sea, and Hudson's Bay is very much greater in area than is the White Sea, surely Hudson's Bay is as much an open sea as the White Sea is. But the distinguished doctor of laws who teaches today from the Whewell chair of international law, is neither the first nor the only publicist who maintains that the White Sea is an open sea. The German jurisconsult, George Frederic von Martens, who taught the law of nations in the eighteenth century at the University of Gottingen, maintained in 1789 the full liberty of the waters of the White Sea.³⁸ He says: "The following are generally recognized as free: the Spanish Sea; the Aquitainian Sea; the North Sea; the White Sea; the Mediterranean Sea; the Straits of Gibraltar." In 1856, a French naval officer, Théodore Ortolan, after having spoken in his treatise *Diplomatique de la mer* of the ancient pretensions of Venice to the domain of the Adriatic Sea, speaks as follows of the international status of the waters of the White Sea:³⁹ "Although Russia could advance with more force claims to the White Sea, that sea is recognized as free for all the nations." Only two years ago, too, Mr. T. W. Fulton, of the University of Aberdeen, an expert in the scientific study of fishery problems, supports the freedom of the White Sea.⁴⁰ He says:

It appears that Russia also claims the White Sea as a *mare clausum* or *mer fermée*, within a line between Cape Kanin (Kanin Nos) and Cape Sviatoï (Sviatoï Nos), where it is about eighty geographical miles in width. If this claim is now made by Russia, it would probably be difficult for her to make it good before an international tribunal did such exist. For not only is the mouth of the width stated, but the area included is nearly 30,000 square geographical miles, only about twenty per cent of which is within the ordinary three-mile limit.

Still more recently, in the beginning of last year, Dr. Thomas Baty, of the London Bar, a vigorous and consistent supporter of the freedom of the sea, equally maintains that the White Sea is an open sea. Discussing the limits of territorial waters, he says:⁴¹ "Nor can the Rus-

³⁸ Georges Frederic de Martens, *Précis du Droit des Gens moderne de l'Europe, fondé sur les traités et l'Usage*, Gottingen, 1789, Vol. I, p. 191.

³⁹ Théodore Ortolan, *Règles internationales et Diplomatique de la Mer*, Paris, 1856, Vol. I, p. 163.

⁴⁰ Thomas Wemyss Fulton, *The Sovereignty of the Sea*, Edinburgh, 1911, p. 657.

⁴¹ Thomas Baty, *The Three-mile Limit*, LAW MAGAZINE AND REVIEW, London, February, 1912.

sian action be supported by any prescriptive right to treat the White Sea as a *mare clausum*. It may at one time have been so; but closed seas are out of date."

A French writer, M. René Waultrin,⁴² while acknowledging that theoretically the White Sea, since its entrance is much more than six miles wide, is an open sea, yet maintains that through the custom of the English trawling vessels fishing since 1906 of their *own volition* off the White Sea outside of an imaginary line drawn from points three miles respectively from Capes Kanin and Sviatoï, which stand guard on either side of the entrance to the White Sea, that great sinuosity of salt water will become in course of time through custom a closed sea. To which may be answered, in the first place, the words of Sir Robert Phillimore:⁴³ "The right of navigation, fishing, and the like, upon the open sea, being *jura merae facultatis*, rights which do not require a continuous exercise to maintain their validity, but which may or may not be exercised according to the free will and pleasure of those entitled to them, can neither be lost by *non user* or *prescribed* against, nor acquired to the exclusion of others by having been immemorially exercised by one nation only. No presumption can arise that those who have not hitherto exercised such rights, have abandoned the intention of ever doing so." And, in the second place, it must not be forgotten that the British Government has not recognized the White Sea as a closed sea, and that it has not prescribed the imaginary line from Cape Kanin to Cape Sviatoï as the limit for other than Russian fishing vessels. In addition, the Government of Great Britain in April, 1906, informed the shipping interests of Hull, that it did not admit any territorial pretensions of other Powers beyond the customary three-mile limit. Nor has the British Government accepted the attempt of that of Russia to extend the Muscovite maritime belt to twelve miles. But if Great Britain does not recognize the White Sea as a *mare clausum*, it cannot help continuing to recognize Hudson's Bay as a *mare liberum*.

How an attempt on the part of Canada to declare the Hudsonian Sea a *mare clausum* would be contrary to the spirit of the age is aptly

⁴² René Waultrin, *La Mer Blanche est-elle une mer libre? — L'Affaire de l'Onward Ho!* REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, Paris, 1911, p. 94 et seq.

⁴³ *Fur Seal Arbitration*, Washington, 1895, Vol. 4, p. 108.

illustrated by a brief survey of how the complete freedom of the Baltic Sea, which is but one-third the area of Hudson's Bay, has been maintained, chiefly by Great Britain, in the face of repeated attempts on the part of the Baltic Powers to declare it a *mare clausum*.

"The political history of the Baltic," as the notable British jurist, Dr. Westlake, has pointed out, "is that of the rise, progress and final defeat of an idea, * * * namely that the states surrounding it could by their agreement convert the Baltic into a closed sea of their own, in which outside Powers should not be allowed to carry on any operations of war."⁴⁴

In the treaty of 1759 between Sweden and Russia, to which Denmark adhered the next year, the contracting nations agreed to use all their power to exclude hostile operations from the Baltic Sea during the war then raging, and the treaty declared that all maritime commerce of all nations should be free in that sea from the attacks of belligerents.⁴⁵ In the convention entered into on August 1, 1780, by Sweden and Russia, to which Denmark adhered the same year and Prussia in 1781, the subscribing nations, after stating that the Baltic states were all enjoying profound peace, contracted with one another "to maintain perpetually that it is a closed sea, and must be regarded as such by its local position, in which all nations may navigate in peace and enjoy the advantage of perfect tranquility; in consequence they will take all measures to guarantee that sea and its coasts against all hostilities, piracy and violence."⁴⁶ The chief parties to that war, Great Britain on the one side and France and Spain on the other, however, declined to accept that declaration except for that war.⁴⁷

Again, in a treaty in 1794 between Sweden and Denmark, the Baltic Sea was declared a *mare clausum*.⁴⁸ In the tenth article of that conven-

⁴⁴ John Westlake, *International Law*, The University Press, Cambridge, 1910, 2d ed., Part I, p. 200.

⁴⁵ Le Baron Ferdinand de Cussy, *Phases et Causes Célèbres du Droit Maritime des Nations*, Leipzig, 1856, Vol. I, p. 134.

⁴⁶ Heinrich Geficken, *Incidents de droit international dans le différend anglo-russe*, REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, Brussels, 1885, Vol. XVII, p. 363.

⁴⁷ Georges Frederic de Martens, *Recueil des traités*, Gottingen, 1818, Vol. III, pp. 195 and 250.

⁴⁸ Le Baron Ferdinand de Cussy, *Phases et Causes Célèbres du Droit Maritime des*

tion it is said: "The Baltic, always to be considered as a *closed sea* and inaccessible to the armed vessels of distant parties engaged in war, is again declared as such anew by the contracting parties, who are determined to preserve its absolute peacefulness."

When the Russian Emperor protested in 1807 against the bombardment of Copenhagen by the British fleet, Great Britain denied in her answer that she had ever acceded to the principles upon which the Baltic states had attempted to establish the inviolability of the Baltic Sea.

France also in 1808 refused to recognize the Baltic as a closed sea. In that year the French privateer, *le Tilsit*, attacked and captured several American merchant vessels in the Baltic off the Prussian coast near Pillau.⁴⁹ *Le conseil des prises* of France, in passing upon these cases, decided that these captures were good prizes, because they had been taken further than three miles from the nearest Prussian shore. Consequently, by that decision France held the Baltic was an open sea. No protest, nor even suggestion, was made that Denmark and Sweden permitted, without objection on their part, British and French war vessels to pass freely through the Sound into the Baltic during the progress of the Crimean War of 1854-1856. Nor during the Franco-German War of 1870-71 was the Baltic closed to the war vessels of the belligerents. Besides, by the treaty of March 14, 1857, concerning the abolition of the Sound dues, Denmark is required by her promise "not to subject any ship, on any pretext, to any detention or hindrance in the passage of the Sound or the Belts." This engagement on the part of Denmark applies without distinction either to the military or the mercantile flags.⁵⁰ Writing in 1894, the French publicist, Piédeliévre, says of the Baltic: "Actually, the Baltic Sea is open to all vessels."⁵¹ À propos of the visit in 1905 of the British North Sea fleet to the Baltic Sea to manoeuvre, and the suggestions made by German newspapers

Nations, Leipzig, 1856, Vol. II, p. 71. The original French text is as follows: "La Baltique devant toujours être regardée comme une *mer fermée* et inaccessible à des vaisseaux armés des parties en guerre éloignées, est encore déclarée telle de nouveau par les parties contractantes, décidées à en préserver la tranquillité la plus parfaite."

⁴⁹ *Ibid.*, Vol. I, p. 135; Vol. II, p. 71.

⁵⁰ Heinrich Gefcken in REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE, Brussels, 1885, Vol. XVII, p. 364.

⁵¹ R. Piédeliévre, *Droit International Public*, Paris, 1894, p. 353.

that the waters of the Baltic Sea should be neutralized, the well-known British jurisconsult, Sir Thomas Barclay, practicing at the Paris Bar, writes in 1910: "The Baltic is still an open sea for the whole world, without restriction of any kind; and even hostilities between any two non-Baltic Powers could be carried on in the Baltic, as elsewhere on the high sea, under the existing practice."⁵²

In addition, there is a recent ruling of the British Government concerning the extent of the territorial waters of one of the sinuosities of Scotland which throws light on the legal status of Hudson's Bay.⁵³ The sixth article of the Herring Fishery Act (Scotland, 1889), prohibits certain kinds of fishing known as otter trawling, inside specified limits of the coast of Scotland, and in Moray Firth, a great sinuosity advancing into the Scottish coast, within a line drawn from Rattray Point in Aberdeenshire to Duncansby Head in Caithness. A Danish subject, Emanuel Mortensen, but the captain of a Norwegian fishing vessel, the *Niobe* of Sandefjord, was prosecuted in 1906 for an infraction on November 30, 1905, of the above sixth article because his vessel had fished in Moray Firth inside the above-mentioned forbidden area in that firth.⁵⁴ Although he pleaded that his vessel had not taken fish inside of the three-mile belt, he was convicted and fined in the sheriff court at Dornoch. He appealed to the High Court of Justiciary. That tribunal, relying a good deal on the Privy Council's judgment in the Conception Bay Case,⁵⁵ confirmed the decision of the sheriff court, on the ground that, whether or not Moray Firth was a British territorial bay, the court was bound by an act of the British Parliament even though the Act controverted a rule of the law of nations. Upon the protest of Norway, however, against this interference with one of her vessels catching fish in the high seas outside of the accustomed three-mile limit, the British Government, while recognizing that the Scotch courts were bound in delivering their judgments by a municipal statute

⁵² *Encyclopaedia Britannica*, 11th ed., 1910, Vol. XXI, p. 12.

⁵³ James Brown Scott, *Argument of the Honorable Elihu Root on behalf of the United States before the North Atlantic Coast Fisheries Arbitration Tribunal at The Hague, 1910*, World Peace Foundation, 1912, pp. 293, 296.

⁵⁴ *The Scots Law Times Reports*, Edinburgh, Vol. XIV, p. 227; Mortensen v. Peters, in the High Court of Justiciary.

⁵⁵ *Law Reports*, 2 *Appeal Cases*, London, 1877, p. 420.

of Great Britain, decided that, as the fishing had taken place although at a point *inter fauces terrae* yet outside of the territorial belt of three miles, the Norwegian captain's fine must be remitted.

During a discussion in Parliament upon the question, Lord Fitzmaurice, the Under-Secretary of State for Foreign Affairs, speaking for the British Government, defined the extent of territorial waters as follows:⁵⁶

Territorial waters are: first, the waters which extend from the coast line of any part of the territory of a state to three miles from low-water mark of bays the entrance to which is not more than six miles in width, and of which the entire land boundary forms part of the territory of a state. By custom, however, and by treaty and in special convention the six-mile limit has frequently been extended to more than six miles.

According to the above language of Lord Fitzmaurice, the whole question of what embayed waters, whose entrances are more than six miles wide, form part of the high seas and what are included in their entirety in the category of territorial waters, is left absolutely open and undecided so as to conform to the needs of future exigencies. But, speaking subsequently on the same question involved in the international status of the waters of Moray Firth as raised by the case of the *Niobe*, the Under-Secretary for Foreign Affairs said:⁵⁷

At the time of the Bering Sea Arbitration this fishery (Moray Firth) controversy had already begun, and therefore it was not unnatural that those who were arguing the case of the United States should take advantage of what they considered might be a damaging admission or confession on our part in regard to the Herring Fisheries (Scotland) Act, 1889. Reference was expressly made to the fact that this Act had been made applicable within a line drawn from Duncansby Head to Rattray Point and that "any person" who violated it was liable to a penalty. From this it was sought to be argued that the application of the Act beyond the three-mile limit was not therefore limited to British subjects. In the British argument it was pointed out in reply that "any person" was an expression commonly used in British statutes dealing with crimes and misdemeanors, and was never applied except to persons owing obedience to the British Parliament. The distinguished lawyers representing Great Britain stated that—

"Both in the case of Colonial laws and in the case of English laws

⁵⁶ *Parliamentary Debates*, authorized edition, 4th series, London, 1907, Vol. 169, p. 289.

⁵⁷ *Ibid.*, pp. 989-990.

the words "any person" mean "any person subject to the jurisdiction of the legislature passing such laws."

That is "subject" in accordance with the principles of international and constitutional law.

Then, referring to the judgments given in the courts of Scotland concerning the controversy over the fishing rights in Moray Firth, Lord Fitzmaurice continued:

The principle on which all the judgments proceeded was that as Parliament had legislated in a definite manner for all persons within a defined area, Parliament must be presumed to have satisfied itself of its power and right to do so before passing the enactment * * * there is absolutely nothing to justify the idea that there has been a collision of opinion between the Foreign Office and the highest court of law in Scotland. The judges, while bound for the reasons stated to arrive at the decision they did, clearly saw that there was an international aspect of this question which a court of law could not deal with under municipal law, but which must be left to the Foreign Office to deal with through the ordinary methods of diplomacy.

Then, speaking *à propos* of what the Scottish office would do concerning the question, the Under-Secretary said:

It is Mr. Sinclair's intention, as advised, to take proceedings against all British subjects who can be proved to have acted in contravention of the by-law in any capacity while serving in vessels flying the Norwegian flag. Complaints will, of course, only be served on such persons, when in British jurisdiction.

By that ruling, the British Government formally acknowledged to the Government of Norway and so to all the nations of the world, that Moray Firth, all of whose waters in earlier centuries Great Britain has claimed as territorial on the Scottish theory that the firth came within the area of waters reserved for Scottish fishermen, is now an open sea. Moray Firth, however, is infinitely smaller than the Hudsonian Sea which the leading international publicists of the world for more than two centuries have held is a part of the high seas. Surely, when tested by the judgment of the British Government in the case of the relatively small body of water named Moray Firth, the waters of that immense sea called Hudson's Bay also form a part of the open sea.

If the legal situation of Hudson's Bay is regarded in the light of the historic development of the gradual abandonment of the claim of various

states to jurisdiction over large extents of the sea, and the substitution for those restrictive claims of the principle of freedom of navigation, commerce and fishery for all nations, more and more over the high seas,⁵⁸ it is perfectly clear and evident that in the light of present international law, the waters of Hudson's Bay — the three-mile belt of territorial waters following the contour of the shore always excepted — form part of the high seas and are free to the vessels of all nations for fishing as well as navigation. In past times when Great Britain had not relaxed nearly as much of the former extravagant claims set up on her behalf by the Stuart Kings to jurisdiction over the salt water as she has given up within a comparatively recent period of time, eminent international jurists, among them the famous British jurisconsult Sir Robert Phillimore, proclaimed the great Hudsonian Sea as a *mare liberum*. Neither within the last fifty years, when Phillimore, Bonfils, Chretien, Fauchille, de Louter and other publicists have written, nor even in the middle of the eighteenth century, when the justly celebrated Vattel was the leading living exponent of the law of nations, was Hudson's Bay or Sea looked upon as being a closed sea. If the waters of the Hudsonian Sea have passed from the status of an open sea to that of a closed one, it would be well to have this change in the legal status of that great sea pointed out to the world at large, so that the nations might know of it. In order to claim large seas or bays, whose entrances from the ocean are wider than ten miles from shore to shore, as entirely territorial, the nation advancing such a claim must show that its alleged right to territorial jurisdiction over all the waters of the sea or bay in question has been asserted on its part and acknowledged by the family of nations for a long time past. As Dr. Hershey, of the University of Indiana, well says:⁵⁹ "Some States claim jurisdiction over *certain* bays whose entrance is too wide to be effectively commanded by coast defenses, and such claims would seem to have the sanction of the law of nations, *provided they are based upon immemorial custom.*" Such a thing as appropriating the sea, however, outside of the conventional three-mile

⁵⁸ Ernest Nys, *Le Droit International: Les principes, les théories, les faits*, Brussels, 1912, 2d ed., Vol. II, p. 171 *et seq.*

⁵⁹ Amos S. Hershey, *Essentials of International Public Law*, New York, 1912, p. 200. The italics have been added by the present writer.

marine belt following the trend of the coast by municipal statute, without regard to the rights of other nations, is contrary to modern practice. The recent case of the legal international status of the waters of Moray Firth as decided by the British Foreign Office in response to the protest of the Norwegian Government in behalf of the rights of a Norwegian fishing vessel, teaches that it is no longer possible to make as territorial all the waters of seas and other embayed parts of the ocean whose entrance is wider than six miles, often many times six miles in width, simply by enacting a municipal statute, as was done in the case of the Bay of Conception in Newfoundland, except in violation of the law of nations.

To make of Hudson's Bay — which has for so long been regarded as and is still a *mare liberum* — a *mare clausum* would be to turn back the clock of time and to return to the exclusive and narrow policy of the Middle Ages.

Finally, in addition to the various different opinions that are beginning to grow between a number of nations concerning the international and legal status of the waters of the Hudsonian Sea in North America, the White Sea in the far north of Europe, the great estuary of the Rio de la Plata in South America, and other similar large sinuosities in different parts of the earth, an increasing number of distinguished international jurisconsults as well as important fishing interests are urging more and more strongly that the present limits of the territorial sea as now generally accepted do not properly serve today the interests of humanity, either in protecting the shores of neutral vessels from the guns of the war vessels in action of belligerent Powers or the great spawning grounds of the ocean against promiscuous and reckless ways of fishing. It would seem advisable for the Third Hague Peace Conference to take up for discussion the whole question of the limits of the territorial sea with a view to a revision and a general adoption of those limits by the nations of the world. In discussing the subject of embayed waters, the legal status of all sinuosities for which a special agreement has been entered into by two or more Powers, could be withdrawn from the discussion in so far as the contracting Powers in each particular case were concerned, if they so wished. For example, the special agreement of 1839 between Great Britain and France recognizing the major part of the

Bay of Cancale, though it is seventeen miles wide, as French territorial waters on the part of Great Britain, need not be included in the general subject of a revision by a future Hague Peace Conference of the limits of the extent of the territorial waters in general.

It would certainly be much better for the nations to agree by the adoption of international rules regulating the manner of fishing in the sea as well as to fix the limits of the territorial sea so as to prevent the ruthless impoverishment of the great fishing grounds of the world, than to run a useless risk that some day, sooner or later, two or more Powers should become involved in a costly and destructive war because of the rivalry of their fishermen on some part of the high seas, as, for example, the fleets of the States-General of the Netherlands and of England fought under the command of famous admirals, such as the Hollanders, Van Tromp and De Ruyter, the Englishmen, Blake and Monk, many bloody battles because of the rival rights and claims of the Netherlands and England to fish in the North Sea and the British Channel. And in discussing and revising the extent of the marine belt, the delegates of the nations at the third or some other Hague Peace Conference, could take up the question of the international legal status of such great sinuosities as the Hudsonian Sea, the estuary of the Rio de la Plata, the White Sea, Moray Firth, and other embayed waters. In that way the extent of the open and territorial sea could be examined and decided from the point of view of the interest and needs of all of the family of nations, in order to strengthen and render more certain the maintenance of the peace of the world.

THOMAS WILLING BALCH.

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EDITORIAL COMMENT

MR. BRYAN'S PROPOSED COMMISSIONS OF INQUIRY

On April 23, 1913, Secretary of State Bryan laid before the Committee on Foreign Relations of the Senate a proposition to create commissions of inquiry, and it is understood that the members of the Committee informed Secretary Bryan that they would approve any treaties negotiated along the lines which he had discussed with them and which had been somewhat modified during the discussion. On April 26, Secretary Bryan delivered to each of the diplomatic representatives accredited to Washington copies of his proposition, with the request that it be sent to and carefully considered by their respective governments. While the proposition is tentative and subject to change so as to meet the objec-

tions or the desires of any particular government, it is believed that the following paragraphs give the main features of the plan:

1. That the composition of the international commission is to be left to agreement between the parties and that as a basis of such agreement the following suggestions are made.

2. That the international commission referred to in the preceding paragraph shall consist of five members and be composed as follows: one member from each of the contracting parties; one to be chosen by each of the contracting parties from a foreign country; and the fifth member to be agreed upon by the two contracting parties. The commission is to be constituted as soon as it may be convenient after the conclusion of the treaty and vacancies in the commission are to be filled according to the method of original appointment.

3. That the treaties be concluded for a specific time, and it is suggested as a basis of discussion that the time be one year, with the further suggestion that, if a year be considered too long or too short, the United States will consider either a shorter or a longer period.

The portion of the project so far given deals, it will be seen, solely with the appointment of an international commission, but of course it is necessary to determine what questions shall be submitted to the commission, the action which the commission shall take upon the questions, and what effect shall be given to its findings or conclusions. It is understood that the text dealing with these important questions is the following:

The parties hereto agree that all questions of whatever character and nature in dispute between them shall, when diplomatic efforts fail, be submitted for investigation and report to an international commission (the composition to be agreed upon); and the contracting parties agree not to declare war or begin hostilities until such investigation is made and report submitted.

The investigation shall be conducted as a matter of course, upon the initiative of the commission, without the formality of a request from either party; the report shall be submitted within (time to be agreed upon) from the date of the submission of the dispute, but the parties hereto reserve the right to act independently on the subject matter in dispute after the report is submitted.

Supposing that this statement is correct, the commission is a commission of inquiry possessing the power to investigate and report on any and all disputes between the contracting parties which diplomacy has failed to adjust, and it would appear that the commission may itself take the initiative without waiting for a request from either or both of the parties, but that conformably to the nature of a commis-

sion of inquiry, its findings or conclusions are not binding upon the contracting parties, who are free to give such effect as they may deem proper to the findings and conclusions.

In view of the fact that all questions are within the competence of the commission, it is necessary that it shall be an advisory body, not a body vested with power to decide the matter at issue; otherwise the foreign offices of the contracting parties would abdicate functions or at least surrender a large portion of their powers and prerogatives to a commission in which they were represented by only one of their subjects or citizens, and in which strangers to the controversy cast the deciding vote.

It may be asked why the commission should consider the dispute if it cannot pass upon it in such a way as to bind the governments, to which the reply is that discussion resulting in a finding or a conclusion without any binding effect whatever is often tantamount to an adjustment. The plan does not exclude the idea of war, but postpones it until the investigation is made and the report submitted. This does not mean of course that war will then follow, but that the contracting parties agree at least not to resort to arms before the commission shall have completed its investigation and submitted its report. In simplest terms, the invitation is to investigate before war rather than to investigate after war, as has been commonly the practice hitherto. This latter investigation however, is not made by the parties interested, but by historians, whose impartial judgment has condemned many a war which the erstwhile belligerents considered either necessary or justifiable. *Die Welt Geschichte* is indeed *das Welt Gericht*.

In the *Washington Post*, of July 13, 1913, Secretary Bryan is quoted as having submitted the following proposal to the various governments represented at Washington:

This government is prepared to consider the question of maintaining the *status quo* as to military and naval preparations during the period of investigation, if the contracting nation desires to include this, and this government suggests tentatively that the parties agree that there shall be no change in the military and naval program during the period of investigation unless danger to one of the contracting parties from a third compels a change in said program, in which case the party feeling itself menaced by a third Power, shall confidentially communicate the matter in writing to the other contracting party, and it shall thereupon be released from the obligation not to change its military or naval program, and this release will at the same time operate as a release of the other contracting parties. This protects each party from the other in ordinary cases, and yet provides freedom of action in emergencies.

It does not seem desirable to discuss in detail the provisions of this very interesting and important project, as Secretary Bryan states that he has submitted it to the governments for their consideration, that its terms are subject to variation according to the desires of the contracting parties, and that negotiations to give final form and effect to the project will not be taken up until the fall. From time to time the Secretary has taken the public into his confidence and in the last week of June he stated that twenty-two governments had expressed their approval of the project.

It is highly gratifying to the peace-loving people of the United States that the administration should be willing to submit through diplomatic channels a proposal to have all disputes after the breakdown of diplomacy submitted to a commission composed, as has been said, of a majority of foreigners, and that the administration is willing apparently to bind itself not to declare war, as far as this can be done, because Congress has the constitutional right to declare war, before such an international commission has examined and reported upon the particular dispute, and that, finally, the administration is prepared to maintain "*the status quo* as to military and naval preparations during the period of investigation."

The project is not in any sense of the word inconsistent with arbitration. It is evidently intended to operate when arbitration has been suggested by one or the other of the nations in controversy and has been rejected, for, if the proposal to arbitrate be accepted and carried into effect, the dispute is settled by the award and removed from the field of controversy. It is an added guarantee of peaceful settlement. It gives time for the nations to cool off, as it were, during the period of inquiry, and we know that the cooling off process goes far of itself to prevent war. The proposal is very interesting and important from the international standpoint, and is in marked contrast to the commission of inquiry provided for in ex-President Taft's proposed treaties. In these the commission of inquiry was apparently to be composed of an equal number of nationals of each of the contending parties, whereas in the present proposal the majority of the commission is to be composed of subjects or citizens of nations strangers to the controversy. This form of commission of inquiry is to be preferred to the other, inasmuch as it gives full effect to both the word and the spirit of the convention for the peaceful settlement of international disputes, adopted by the First Hague Conference of 1899 and revised by the Second Con-

ference of 1907, which regarded the settlement of international disputes as a matter of concern not merely to the nations in controversy, but to the world at large by providing that the decision of the controversy might be in the hands of the umpire, according to the convention of 1899, and must be in the hands of the majority composed of foreigners according to the revised convention of 1907.

THE VISIT OF HON. ROBERT BACON TO SOUTH AMERICA

Announcement has been made by the Carnegie Endowment for International Peace that the Honorable Robert Bacon, formerly Secretary of State and American Ambassador to France, will make a visit under its auspices to South America during the coming fall. The specific objects of Mr. Bacon's visit have not yet been made public but the general object of the mission is stated to be to secure the interest and sympathy of the leaders of opinion in South America in the various enterprises for the advancement of international peace which the Endowment is seeking to promote, and by means of personal intercourse and explanation to bring about the practical co-operation of South America in that work.

The aims and purposes of the Carnegie Endowment have already several times been commented upon in the columns of this JOURNAL. In the issue of January, 1911, we printed Mr. Carnegie's letter, which accompanied the deed transferring the bonds, in which Mr. Carnegie stated his reasons for establishing the trust, and in the issue of April, 1911, the permanent organization effected by the Trustees and the specific purposes to which they would devote the income from the trust were stated. In the following number we printed an address of Dr. Nicholas Murray Butler, a member of the Board of Trustees and of the Executive Committee of the Endowment, delivered at the opening of the Lake Mohonk Conference on May 24, 1911, in which he explained the division of the Endowment's work into three general departments, the Divisions of Intercourse and Education, Economics and History, and International Law, and stated what the Trustees hoped to accomplish in each division.

The Year Books issued by the Endowment for 1911 and 1912 supply the details of the work being done in each of these divisions, and some idea may be obtained from them of the enterprises which Endowment might hope to extend to South America as the result of Mr. Bacon's visit.

In the Division of Intercourse and Education there has been appointed a corps of correspondents and an advisory council for Europe and Asia composed of prominent and influential men in the different countries. No provision for such an organization for Latin America seems yet to have been made, and the extension of the European organization to those countries would seem to be a prime object of Mr. Bacon's visit. There is also reference in the Year Books to an educational exchange with Latin America, including not only an exchange of professors, but also an exchange of students. It appears from the last Year Book that the educational exchange with Japan has already been successfully carried out by the visit to the United States during 1911-1912 of the well known Japanese educator, Dr. Inazo Nitobe, and the return visit to Japan during the present year of Dr. Hamilton W. Mabie; but it does not appear to have been practicable so far to bring about such an exchange with Latin America, although provision for it has been made each year by the officers and Trustees. It was planned to put the exchange with Latin America into operation during the year 1912, and arrangements were begun for the visit to the United States of Dr. Luis M. Drago, formerly Minister of Foreign Affairs for the Argentine Republic, but the state of Dr. Drago's health was such that the plan could not be consummated. Perhaps the presence of Mr. Bacon in South America will be utilized to arrange a definite program for carrying out this project.

Another project reported under this Division is the scheme for international visits of representative men. Such visits have already been inaugurated with Asia by the recent trip of Dr. Charles W. Eliot, and with Europe by the visit of Baron d'Estournelles de Constant and several other eminent Europeans to the United States. The trip of Mr. Bacon is evidently the first step in such an interchange of visits with Latin America. This Division seems also to be particularly interested in the extension of branches of the Association for International Conciliation, which has its headquarters in Paris and a strong branch in New York City. In this connection it is interesting to note that if the recommendations of the Acting Director of the Division of Intercourse and Education are followed by the Trustees, it is likely that the Endowment will rely more upon this form of propaganda in the future, as distinct from the work of peace societies which have heretofore been generally the agents of popular propaganda in the peace movement. The following extract from the report of the Acting Director to the Executive Committee, dated November 16, 1912, shows the clear distinction

between the two forms of organization and the separate fields of activity of each:

The Acting Director is entirely clear in the opinion formed as a result of two years of study of conditions which prevail both in European countries and in the United States, that the work of propaganda in support of the ends which the Endowment has been established to serve, can be carried on most effectively and economically not through peace organizations alone, but through organizations having a broader scope and making a wider appeal. Those persons who become members of a society whose name indicates that it is devoted to peace, are already converted. In every nation in the world there are hosts of right-thinking and well-minded men and women who, while wholly unwilling to affiliate themselves with any peace society, are ready and anxious to assist in the work of promoting better international understandings and closer international relationships from which peace will result as a by-product. The function of the peace societies is a distinctive and very important one. They may well form a compact and effective body of workers in the cause of international peace and arbitration, who constitute as it were the advance guard of the great army which it is hoped can be recruited and brought into active service. In the present state of public opinion throughout the world, the best use which the Carnegie Endowment can make of such portion of its funds as can be devoted to the work of active propaganda, is to build up and support organizations which give evidence of a willingness and a capacity to promote closer international relations, to advance the knowledge on the part of each civilized people of its fellows, and to multiply the ties of friendship and concord between the great nations of the earth. Among these organizations peace societies will of course be found, but it would not be judicious to entrust the whole work of propaganda to them.

Societies of international conciliation have recently been started in Germany, Great Britain and Canada, and steps are being taken to organize an association of this kind in Argentina. It may be feasible for Mr. Bacon on his forthcoming trip to suggest the establishment of such organizations in the other countries which he will visit.

Perhaps the most far-reaching and important work the Endowment is doing is that which is being conducted under the Division of Economics and History. A full account of the work of this Division and of the conference of economists held under its auspices at Berne in 1911 for the purpose of devising a plan of inquiry and investigation is contained in the editorial columns of this JOURNAL for October, 1911, p. 1037. There is also printed therein the full program recommended by that conference. It appears from the reports of the Director of this Division that the members of the Conference of Berne have since been formed into a permanent Committee of Research to supervise the actual work of investigation, which is entrusted to collaborators able to devote a large portion of their time to the work and to put the results in form

suitable for publication. An American economist having unusual familiarity with South American conditions and large attainments in economic science, both theoretical and practical, Professor David Kinley of the University of Illinois, has been added to the Committee of Research, and he has planned a line of research having its field in South America. Mr. Bacon will probably find the occasion opportune to explain the work of this Division and to invite the aid and coöperation of the economists of South America in extending to these countries the program of studies outlined by the Conference at Berne.

The JOURNAL has likewise had occasion to comment on the organization and projects of the Division of International Law. In the October, 1912, number, an editorial comment explained the relations which had been established between the Institute of International Law and the Division of International Law of the Endowment, under which the former has accepted the title and performs the functions of General Legal Adviser of the Division. In the same issue there was a comment upon the organization of the American Institute of International Law, and further comment and information concerning this project was given in an editorial in the January number for this year. The field of usefulness of the European Institute to the Endowment seems to be limited to the Eastern Hemisphere, and if it is the intention of the Trustees to secure a similar advisory body for Latin America, the proposed American Institute would seem to be an admirably constituted body to perform these functions, and it has the advantage of being already in existence, and will no doubt be willing to follow the example of its distinguished European prototype and enter into similar arrangements with the Division of International Law.

Unlike the European Institute, a feature of the American Institute requires the establishment of national societies of international law. Mr. Bacon's visit could not only, therefore, be utilized to accelerate the organization of the Institute in those countries of South America which may not have progressed so far as others in this organization, but also to suggest and aid in the formation of national societies of international law to be affiliated with the Institute in accordance with the plan already outlined in the previous issues of the JOURNAL above referred to.

Another project of the Division of International Law in which Mr. Bacon could be particularly useful is the proposed Academy of International Law at The Hague. This proposal is briefly outlined in a comment in the January, 1912, number of the JOURNAL at p. 205. It

appears from the report of the Director of the Division of International Law, dated October 26, 1912, that before committing itself definitely to the support of such an Academy, the Executive Committee of the Endowment wishes to be assured that the Academy is approved generally by the countries represented at the Second Hague Conference, and that, if established, these countries will aid and assist in securing a student body who, after having taken the courses at the Academy, will occupy such positions in their country as to make their influence felt in matters pertaining to international relations. It is explained that by this is meant students drawn from the different branches of the government service, such as the diplomatic and consular services, and the military, naval and civil establishments. The successful operation of such an arrangement necessarily requires the cordial sympathy and support of the South American countries, and Mr. Bacon's former high position in the Government of the United States will doubtless make it possible and proper for him to broach this subject to the high officials whom he will meet in the countries visited and to secure if possible their assurance of cooperation.

Mr. Bacon is now in the Philippine Islands, and the details of the itinerary which he will follow in South America have not been published. It is expected, however, that he will return from the Orient by way of Europe, will sail from Lisbon about the middle of September, and will return to New York before Christmas. He will visit as many countries on the eastern and western coast of South America as his limited time will permit.

Mr. Bacon will be the first American statesman to visit South America since the memorable visit of Senator Elihu Root, then Secretary of State of the United States. Mr. Root's trip was such a success in the good results accomplished and in the ties of friendship and good will resulting from it, that it is hardly to be expected that Mr. Bacon, traveling as he is in a private capacity, will attain such marked results. If he succeeds however, in small measure, in awakening the sentiments which were expressed to Mr. Root on every hand, and if he spreads the gospel of good will and friendship, of good understanding and conciliation, of justice and of peace, which it seems to be the desire and purpose of the Carnegie Endowment to spread to South America, as it has done, and is doing, in North America, Europe and Asia, his mission will have been an unqualified success and the Trustees of the Endowment which sent him will have just cause for

congratulations for this enlargement and extension of their field of activity.

THE AMERICAN AND BRITISH PECUNIARY CLAIMS ARBITRATION

In a previous issue of the JOURNAL,¹ a statement was printed concerning the outstanding pecuniary claims between the United States and Great Britain, giving the character of the claims, a brief review of the recent diplomatic steps leading up to the agreement to arbitrate these claims, and a summary of and comments on the terms of the special arbitration agreement signed at Washington by the two governments on August 18, 1910, the text of which was given in the accompanying Supplement.²

Article 10 of the agreement provided that it, and any schedules of claims agreed upon thereunder, should become binding only when confirmed by an exchange of notes. Such confirmation of the agreement and a schedule of claims and terms of submission³ agreed upon June 6, 1911, was had on April 26, 1912, and the exchange of notes containing the confirmation also specified the date of the first meeting of the tribunal which, by Article 6 of the special agreement, was left to be fixed thereafter by the two governments.

All of the necessary preliminaries to the arbitration thus having been accomplished, the two governments proceeded to organize the arbitral tribunal which is provided for in Article 3 of the special agreement. This article embodies the provisions of Article 87 of the Convention for the Pacific Settlement of International Disputes, signed at The Hague, October 18, 1907, of which both Great Britain and the United States are signatories, and each government in accordance with the terms of that article, appointed an arbitrator, and the two arbitrators thus selected chose an umpire.

The JOURNAL is happy to state that the umpire picked on behalf of the United States is the Honorable Chandler P. Anderson, recently Counsellor for the Department of State. Although the JOURNAL has heretofore, upon the occasion of his appointment as Counsellor for the Department of State, called attention to Mr. Anderson's long and

¹ October, 1911 (Vol. V), p. 1033.

² October, 1911 (Vol. V), p. 257.

³ The schedule of claims and terms of submission are printed in the Supplement for October, 1911 (Vol. V), p. 261.

valuable experience in matters which peculiarly fit him for the highest positions involving intimate knowledge of the principles of international law,⁴ a brief repetition of his connection with international arbitrations will be of interest in view of the exacting and responsible duties which he will be called upon to perform in his present office. In 1896-97 Mr. Anderson was secretary of the Bering Sea Claims Commission. In the following year he was secretary of the Anglo-American Joint High Commission for the settlement of Canadian questions. In 1903, he was one of the counsel for the United States before the Alaskan Boundary Commission and in 1910 he was the American Agent in the arbitration of the North Atlantic Coast Fisheries controversy before the Hague Tribunal. It is also worth repeating to call attention to the fact that Mr. Anderson was one of the founders of the American Society of International Law and has from the beginning honored the members of the Society and the readers of the *JOURNAL* by serving as Treasurer of the former and one of the editors of the latter.

The *JOURNAL* is also happy to state that the eminent arbitrator appointed by the Government of Great Britain is also a member of the American Society of International Law. The Right Honorable Sir Charles Fitzpatrick, Great Britain's appointee, has been Chief Justice of Canada and Deputy Governor-General since 1906. He was formerly a member of the Dominion Parliament from the County of Quebec. In 1896 he was Solicitor General and from 1901-1903 he was Minister of Justice of the Dominion. In addition to his long experience as a law officer and as head of the judiciary of Canada, which give him exceptional qualifications as a judge, Sir Charles has also had experience as an international arbitrator, for in 1910 he was one of the members of the Hague Tribunal which heard and decided the controversy between Great Britain and the United States concerning the North Atlantic Fisheries. At the annual banquet of the Society held at the close of the Fifth Annual Meeting in Washington, on April 29, 1911, Sir Charles honored the members by not only attending the banquet, but by making a long and remarkable address on the subject of international arbitration. This address is printed in the *Proceedings* of the Society for 1911, pp. 345-360. The address was so clear and logical in its statement of the case for international arbitration and the views it expressed as to the future development of this rapidly growing institution so

⁴ See *JOURNAL* for April, 1911 (Vol. V), p. 440. See also April, 1913 (Vol. VII), *JOURNAL*, p. 359.

reasonable that it was reprinted and distributed by the thousands by the American Association for International Conciliation. As showing at once the point of view of the jurist and the practical observer of the international events of the day, the following short paragraph is quoted from Sir Charles' remarks:

No one who has watched with care the most recent development of the arbitration movement can doubt that the trend of opinion, and especially on this continent, is now in favor of tribunals which have the character and authority of courts of law. It may be objected that strictly judicial decisions imply the sanction of force behind them, which may compel obedience. That may come, and some of us may yet live to see an international police force. But it is relevant here to point out that so far no case for the necessity of such a force has yet been made out. History is full of the stories of broken and violated treaties, but there is happily no record of the repudiation of an arbitral award. The pressure of the public opinion of the world is strong and growing stronger every day, and the risk of its displeasure will not be lightly encountered.

If the Society has cause for congratulation in the selection of two of its eminent members to positions as arbitrators in this case, it has been signally honored by the selection of another and no less eminent member, M. Henri Fromageot, Advocate before the Court of Appeals of Paris, member of the Superior Council of the Merchant Marine, as umpire. The Governments of the United States and Great Britain have also cause for congratulation in the selection of M. Fromageot, for his standing as an authority is not only high but his experience in international arbitrations is long and enviable. In 1903, he was secretary of the delegation which appeared on behalf of the Government of France before the Hague Tribunal in the case of the claim of Germany, Great Britain and Italy against Venezuela for preferential treatment. At the time of the difficulty between Great Britain and Russia growing out of the firing by Russian ships upon British fishing vessels at Hull, England, in 1904, he appeared before the International Commission of Inquiry at Paris as Counsellor for the Russian Government. In the following year he represented France as Agent before the Hague Tribunal in the arbitration of the Japanese House Tax cases. He was a delegate of France to the Second Hague Peace Conference in 1907, and to the London Naval Conference in 1909. In 1911 he again represented the Russian Government in the Arbitration at The Hague with Turkey relative to the payment of interest on the Turkish indemnity of 1879; and a few months ago he again represented his government, in the ar-

bitrations with Italy at The Hague growing out of the seizure of the French mail steamers *Carthage* and *Manouba*.

It is also interesting to note that the agents in this arbitration not only for the United States, but of Great Britain as well are also members of the American Society of International Law. For this difficult and responsible position, the United States Government selected Mr. Robert Lansing, one of the founders and a member of the Executive Committee of the Society and a member of the editorial board of the JOURNAL. That Mr. Lansing is well qualified for the position is shown by the fact that he has participated in more international arbitrations than any American publicist of the present generation and, with the probable exception of M. Fromageot, than any publicist of any other country. In 1892-93 Mr. Lansing was associate counsel for the United States in the Bering Sea Arbitration; in 1896-97 he was counsel for the United States before the Bering Sea Claims Commission; he acted as Solicitor for the United States before the Alaskan Boundary Tribunal in 1903; and in 1909-10 he was one of the counsel for the United States in the North Atlantic Coast Fisheries Arbitration at The Hague.

Mr. C. J. B. Hurst, C. B., Agent for Great Britain, has been Assistant Legal Adviser to the Foreign Office for the past eleven years and is therefore well trained in not only the theory but the practice of international law.

The opening session of the Tribunal was held in the City of Washington, in the chambers of the Commerce Court on May 13, 1913. There were present on this occasion, in addition to the members of the Tribunal and the agents and counsel for the two governments, the Acting Secretary of State of the United States and the Ambassador of Great Britain at Washington. The presence of these high officials is a tribute to the importance and magnitude of the arbitration. Hundreds of claims involving in the aggregate millions of dollars, some of them a century old, will be considered and disposed of by the Tribunal. It will finally settle a number of claims, some insignificant in amount and others involving fortunes, which have been harassing and trying the patience of the foreign offices of the two governments for many years, and when the Tribunal adjourns all claims outstanding between the two governments at the date of the signature of the arbitral agreement will, unless expressly reserved, and whether submitted to arbitration or not, be forever and finally barred, under the terms of Article 2 of

the special agreement of arbitration. As stated by the President of the Tribunal in his opening remarks:

The difference between this and other arbitral tribunals is that we have not to settle one subject of litigation but a large number of cases entirely different in fact and in law, one from the other, arising out of various circumstances, and having a very different character — fishing and shipping claims, property rights, collection of customs duties, naval and military operations, government contracts.

Before entering upon his duties as arbitrator each member of the Tribunal subscribed to a solemn declaration in writing that he would examine and decide the claims presented for decision in accordance with treaty rights and the principles of international law and of equity.

The Agents of the two governments on July 11, 1912, adopted rules of procedure governing the matters of "Record of Claims and Proceedings" (Chapter I), "The Pleadings" (Chapter II), "Filing of Pleadings" (Chapter III), "Evidence" (Chapter IV), "Interlocutory Applications" (Chapter V), "The Hearing" (Chapter VI), "The Award" (Chapter VII), "Sessions of the Tribunal" (Chapter VIII). These rules were approved and directed to be entered on the minutes as an order of the Tribunal.⁵

The Tribunal held sessions at Washington from May 13-May 17. It then adjourned to Ottawa, where it met June 9 and remained in session until June 18. It then adjourned to meet in Washington on March 9, 1914.

A number of claims were argued and awards have been rendered in the following four cases of Great Britain against the United States: "Lindisfarne" decided in favor of Great Britain; "William Hardman," claim disallowed; "Yukon Lumber," claim disallowed, and "King Robert," claim disallowed.⁶ Further awards will be rendered on the reconvening of the Tribunal next March.

The present arbitration is a striking example of the trend of opinion, referred to by Sir Charles Fitzpatrick in the paragraph above quoted from his address before the Fifth Annual Banquet of the Society, in favor of tribunals for the settlement of international disputes which have the character and authority of courts of law.

⁵ These rules are printed in the Supplement to this number of the JOURNAL, page 160.

⁶ These decisions will be printed in the next issue of the JOURNAL, and it is planned to print this series of interesting awards in the Judicial Decisions of the JOURNAL as a regular feature until the arbitration is completed. — Ed.

The same tendency was referred to and the present arbitration cited as an evidence of it, by the learned umpire, in the course of his remarks on opening the Tribunal in Washington. He said:

A few weeks ago at The Hague, a Franco-Italian tribunal of arbitration met to adjust three different and rather delicate prize cases, and it has been said by the President of this tribunal:

"For the optimist, this is a beginning — modest, to be sure — of the relatively permanent Tribunal, which will, during a fixed period, settle of right, disputes that may be referred to arbitration by the same High Parties."

To-day the United States government and the government of His Britannic Majesty give another example of the same confidence in the law and of this pacific method of adjusting their claims as it is really proper between civilized nations.

Practically, it seems that nothing is more to be approved than such a tendency towards the constitution of judicial bodies to settle, between different countries, from time to time, though sometimes petty, but for everybody very trying difficulties, which are unavoidable in the business life of nations as well as of individuals.

It is not yet the permanent court of justice, but it is a very useful and practical application of those principles of international justice, which are specially recognized by these three nations and other nations.

CHARLTON EXTRADITION CASE

We print in this issue of the *JOURNAL*¹ the decision of the Supreme Court of the United States rendered June 10, 1913 in the above mentioned case. As appears from previous editorial comment,² the accused was arrested in the State of New Jersey on June 24, 1910 upon complaint of the Italian Vice-Consul on a charge of murder committed in Italy. The fugitive had a hearing before a committing magistrate who deemed the evidence sufficient to sustain the charge and certified the same to the Secretary of State for the issuance of a warrant of surrender to the Italian Government. Counsel for the accused resisted the fugitive's surrender to Italy, but the Secretary of State in a memorandum dated December 9, 1910,³ over-ruled the objections and decided to surrender him to Italy. A writ of *habeas corpus* was then applied for and upon the dismissal of the petition by the lower court an appeal was taken to the Supreme Court of the United States.

Counsel for the appellant raised several objections before the Supreme Court.

¹ *Judicial Decisions*, p. 637.

² January, 1911 *JOURNAL* (Vol. V), p. 182.

³ Printed in *JOURNAL* for January, 1911, p. 188.

First, that evidence of the insanity of the accused was offered at the hearing before the committing magistrate and excluded. After reviewing the statutes of the United States relating to extradition, as construed by the courts in several cases, the Supreme Court held:

We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws.

It was next objected that evidence of the formal demand for the extradition of the accused was not filed within forty days after his arrest. The court found that such a formal demand was in fact made on July 28, 1910, less than forty days after the arrest and that, "every requirement of the law, whether it appears in the treaty or in the Act of Congress, was substantially complied with."

The third objection raised by appellant was that the provision of the treaty under which Italy and the United States mutually agreed to deliver up all "persons" does not include persons who are citizens of the asylum country. The contention was that the express exclusion of citizens or subjects from the operation of the treaty is not necessary, as by implication from accepted principles of international law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included. The court summarized the diplomatic correspondence between Italy and the United States in 1890 when the former country asserted such a principle of international law, referred to the authorities on the subject and examined the provisions of other treaties of the United States covering the matter. The court reached the following conclusion:

The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations.

Finally, appellant took the position that the refusal of Italy to deliver up fugitives of Italian nationality had released the United States from a similar obligation under the treaty. The court sets out the corre-

spondence which passed between the Department of State and the Italian Government concerning this case, from which it appeared that the Department considered this provision of the treaty still in force as regards the United States. The court quoted authorities on international law and decisions of American courts to the effect that a treaty violated by one of the contracting parties does not become void but only voidable at the option of the injured party and that the question of the termination of such a treaty was one for the political branch of the government. The court therefore concluded:

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

There has thus been rendered a decision by the highest court in the United States setting at rest the important questions both of municipal and international law relating to the extradition of fugitives raised by this case. While all of the questions are important and interesting, and a final decision upon them is very desirable, the principal one involved, namely, whether in view of the fact that the Federal Government seems to lack authority to surrender a fugitive criminal to another country in the absence of statutory or treaty provision, the persistent refusal of Italy to surrender Italian subjects who commit crimes in the United States and flee to their native country prevents the United States, on the ground of lack of mutuality in the treaty obligation, from surrendering its citizens who commit crimes in Italy and return to this country. The case was tried by eminent counsel and the decision was well considered and founded on international law and previous judicial decision in the United States. Its reasoning is convincing and the questions brought up for decision seem to be authoritatively settled for the future.

PROFESSOR JOHN WESTLAKE (1828-1913)

The science of international law has lost in the death of Professor John Westlake one of its most unquestioned authorities. But he was not merely an international lawyer; his *Treatise on Private International Law* has been long known as the best English treatment of that subject. He was a trained and seasoned lawyer, and fifty years ago he was suffi-

ciently prominent to be retained in the important and what is now the leading case of the *Emperor of Austria vs. Day and Kossuth*. With Mr. Rolin-Jaequemyns and Mr. T. M. C. Asser, he founded in 1869 the first journal devoted to international law (*Revue de Droit International et de Législation Comparée*). Four years later he was a charter member of the Institute of International Law, and at the time of his death was its honorary president. Professor Westlake was not a prolific author. His *Treatise on Private International Law*, much enlarged from its first edition in 1858, is nevertheless a moderate sized volume. His chapters on the *Principles of International Law* (1894), translated into French by Professor Nys, although weighty in matter, is a still smaller volume. His well-known treatise on *International Law* consists of two small volumes, the first of which entitled *Peace* appeared in 1904 (second edition in 1910); the second entitled *War* in 1907 (second edition in press). More recently (1912), and his last literary work, so far as the public knows, he edited, with a valuable introduction of his own, Ayala's *De Jure et Officiis Bellicis et Disciplina Militari Libri III*, for the series entitled "Classics of International Law," published by the Carnegie Institution of Washington. His articles in English and foreign journals on international law and the conflict of laws are numerous and valuable, and some of them at least should be rescued from the oblivion of the periodical by publication in book form. Until his election in 1888 as Whewell Professor of International Law at the University of Cambridge, in which position he served exactly twenty years, he was known as an able practitioner at the bar and as an authority on the conflict of laws, although various articles and his activity at the meetings of the Institute showed him to be interested in public international law. With his election to the Whewell professorship his attention became concentrated on the law of nations, and his reputation will be that of a writer and thinker on this subject. From the statement that Professor Westlake was not a voluminous author, it would be supposed that he was more of a thinker than he was of a writer, and this is true. To the discussion and solution of problems of international law he brought a mind trained and strengthened by years of practice at the bar and a rare gift of subtle, philosophic analysis. His discussion is brief, the style unadorned and free from passion, but the result cannot be overlooked, however difficult it may be to grasp the meaning. His books would not be given to the beginner; the expert could not do without them. And it is safe to predict that his views will be as interesting and enlightening generations

hence as they are to-day. He did not write on the spur of the moment or for the moment.

The following minute, adopted at the last annual meeting of the American Society of International Law, attests the regard in which Professor Westlake was held by its members:

There are two English publicists, men of high distinction in the field of international law, both professors of the science, both writing freely, very often divergently; upon mooted questions, both honorary members of this Society, — Holland and Westlake. We are called upon to mourn the loss — to England, to our Society, and to our science — of the last mentioned of the two at the ripe age of eighty-four.

Professor John Westlake as a writer upon the history and philosophy of the law of nations had no superior in his time. Without largely representing his Government in public he widely influenced public opinion. Careful and temperate in statement, scholarly in method, philosophical in thought, he embodied the highest ethical and legal standards of our profession. He was calm and logical and orderly. He was learned. He was just. The influence of such a man upon the development of the law can hardly be over-estimated.

THE NINETEENTH LAKE MOHONK CONFERENCE ON INTERNATIONAL
ARBITRATION

The death last December of Mr. Albert K. Smiley, the founder and for eighteen consecutive years the host of the Lake Mohonk Conference on International Arbitration, naturally led to speculation as to the future of those unique gatherings. While the publication of the instrument conveying the Lake Mohonk property to Mr. Daniel Smiley and expressing the earnest hope and belief of the testator that conferences at Mohonk would long continue was reassuring, there remained a certain curiosity whether, in the absence of the quiet, forceful and altogether remarkable personality of their founder, the conferences of the future would follow the lines laid down by him.

Whatever doubt existed on this point must have been largely dispelled by the nineteenth annual conference which met at Mohonk Lake, N. Y., May 14th, 15th and 16th. Starting with the earnest declaration of the new host, Mr. Daniel Smiley, that "there is no change of policy for the conference to announce, nor do I think you either expect or wish any," and running through many of the leading addresses, there was constantly apparent a general conviction that the practical policy of the past should be the keynote of the future. In his address as presiding officer of the opening session, Dr. Lyman Abbott reviewed the first two

conferences, of 1895 and 1896, pointed out how in those early days Mr. Albert K. Smiley had urged that the conference should not discuss the horrors of war but should concentrate on arbitration and the institutions that might reasonably be expected to develop from arbitration, and referred to the strong advocacy by the conference of 1896 and succeeding conferences of an international judicial court. These aims, he declared, should animate the present and future conferences, the true goal being peace only as founded on international justice. The same conclusion was drawn by Dr. James Brown Scott in his searching analysis of the underlying motives and the services of the eighteen conferences already held, and was likewise presented in an impressive address by Dr. Felix Adler.

In itself, the nineteenth conference was like its predecessors in its widely representative personnel and its ability to educe a unanimous opinion on certain topics from an infinite variety of opinions on a general subject. Some conferences have been larger, but few if any have excelled the recent meeting in quality of membership, and none has reached a higher average of thoughtful and valuable papers and discussions. The session devoted exclusively to the subject of the Third Hague Conference, presided over by Dr. James Brown Scott, and that given to the Panama tolls controversy, will have permanent value, and should be of special interest to readers of this JOURNAL. Space does not permit review of the clear-cut papers on the Third Hague Conference by Mr. William C. Dennis and Mr. Jackson H. Ralston of Washington, Professor Amos S. Hershey of Indiana University, Mr. Arthur K. Kuhn of New York, Mr. Edwin D. Mead of Boston, and Mr. Edwin M. Borchard, Law Librarian of Congress, but their influence may be judged from the fact that the platform of the conference, which is later given in full, dealt exclusively with the Third Hague Conference.

On the question of Panama tolls, perhaps no more brilliant arguments for arbitration of the issue have been voiced than in the papers of Hon. Charlemagne Tower, who presided at the fifth session, and Mr. Thomas Raeburn White, both of Philadelphia. A careful analysis of the economic phases was presented by Professor Emory R. Johnson, Special Commissioner on Panama Canal Traffic and Tolls. Congressman Joseph R. Knowland of California, ably supported the policy of exemption of coastwise shipping, and some novel points were developed in general discussion by Mr. Don C. Seitz of the *New York World*, Dr. Lyman Abbott, Mr. W. P. Hamilton, editor of the *Wall Street Journal*,

and others. Although the preponderance of opinion was clearly in favor of repeal or arbitration of the exemption clause, under the rule of practical unanimity in its public declarations the Conference made no specific utterance on the subject, although it did agree on a separate resolution urging that all international agreements be lived up to in spirit as well as in letter.

One of the leading papers was that of Dr. Charles W. Eliot, presiding officer at the fourth session, who discussed the causes of war and their remedies. Addresses dealing with the general movement for international peace were made by Hon. P. P. Claxton, United States Commissioner of Education, by Mr. Norman Angell of London, author of "The Great Illusion," by Mr. Edwin Ginn, founder of the World Peace Foundation, and by Canon Dr. Alexander Giesswein, member of the Hungarian Parliament. A thoughtful address by Professor William R. Shepherd, of Columbia University, on the Monroe Doctrine and the relation of some of its recent forms to international arbitration attracted deserved attention.

A significant contribution to the program was the introduction by the official delegates of about forty leading chambers of commerce and boards of trade of resolutions urging that the Third Hague Conference vest in some international court jurisdiction over questions arising out of contractual relations between one government and a citizen or citizens of another. This resolution, and one favoring the prohibition of money loans to belligerent nations, were adopted by the business men present and were later approved by the Conference.

Appropriate recognition was given to the approaching centennial of Anglo-American peace in the addresses of Mr. Harry S. Perris and Mr. Andrew B. Humphrey, British and American secretaries respectively of the British-American Peace Centenary Committee, Mr. J. Allen Baker, M. P., and Sir George Reid and Mr. Henry Vivian of London. Professor James M. Callahan, of the University of West Virginia, presented a paper of historical importance covering a century of Anglo-American diplomatic relations. The participation in the program of Brigadier General Samuel S. Sumner, Rear Admiral Colby M. Chester and Governor A. O. Eberhart evidenced the representative personnel that has been one of the most valuable assets of all the Mo-honk Conferences.

The platform or declaration of principles, unanimously adopted, is as follows:

The nineteenth annual Lake Mohonk Conference on International Arbitration, in view of the probable meeting of a third Hague Conference in 1915, respectfully recommends:

1. That the Secretary of State of the United States urge the nations which participated in the second Hague Conference to form immediately the international preparatory committee recommended by it to prepare and submit to the nations a program for the Third Hague Conference, and to devise a system of organization and procedure for the Conference itself.
2. That the Secretary of State consider the expediency of submitting to the international preparatory committee at an early date a list of the topics which the United States especially desires to have considered at the Third Hague Conference with an outline of the proposals of the United States on each topic.
3. That the Third Hague Conference reconsider the question of a general treaty of arbitration which shall, in accordance with the principle of obligatory arbitration unanimously adopted by the second Conference, submit to arbitration without restriction disputes of a legal nature, or relating to the interpretation and application of international agreements, and such other controversies as may be considered susceptible of arbitral or judicial determination.
4. That the Court of Arbitral Justice, approved in principle by the second Conference, be established, for the adjudication of disputes of a justiciable nature, without altering the status of the Permanent Court of Arbitration.
5. That the exemption from capture of innocent private property of the enemy on the seas be considered anew by the Third Hague Conference.
6. That in general, greater stress be laid by the Third Hague Conference upon the means and measures by which peace may be maintained, or restored when broken, than upon the rules and regulations of warfare.

Separate resolutions expressed interest in the plan for standing commissions of inquiry, then recently proposed by the Secretary of State; favored the widest publicity for all consummated international agreements; and recommended as highly desirable the negotiation of treaties or conventions (analogous in nature and scope to the Rush-Bagot Agreement of 1817) of particular or special interest to two or more contracting Powers.

THE SEVENTH ANNUAL MEETING OF THE SOCIETY

The seventh annual meeting of the American Society of International Law was held as scheduled in Washington April 24-26, 1913. In many respects the meeting was the most interesting, important and successful yet held by the Society.

As indicated in the editorial comment on p. 169 of the January JOURNAL, the general subject chosen for discussion was "International use of Straits and Canals, with especial reference to the Panama Canal."

The general subject was subdivided into topics, and in arranging the speakers under the several topics, questions of a non-controversial character were assigned to but one speaker, while on questions of a contentious nature speakers were secured on both the affirmative and negative sides, so that it could not be said that the Society, which is purely professional and scientific in its aims and purposes, had taken sides in the controversy existing between the United States and Great Britain over the exemption of American coastwise vessels from the payment of tolls in passing through the Panama Canal. It is believed that the Committee on Program accomplished its purpose in arranging the program in this manner as will be seen from a perusal of the papers read and discussions had under each topic.

The meeting opened on Thursday, April 24, 1913, at eight o'clock p. m., in the New Willard Hotel. The President of the Society, Honorable Elihu Root, had planned, in accordance with his unbroken practice since the foundation of the Society, to preside at the opening session and deliver the presidential address. He was, unfortunately, however, owing to a sudden bereavement in his family not able to attend this year, and his address, which was all prepared and printed, was read by the Secretary. It will be recalled that this date, April 24, 1913, was the fiftieth anniversary of the promulgation of the "Instructions for the Government of the Armies of the United States in the Field," prepared by Dr. Francis Lieber and known as General Orders No. 100. Mr. Root's address was therefore devoted principally to an appreciation of Dr. Lieber and his services to international law and humanity.

Dr. Talcott Williams, Director of the Columbia School of Journalism, followed with a paper on "The share of the United States in opening the world's seas and waterways." The first session closed with an address by His Excellency Gregers W. W. Gram, Minister of State of Norway, who came to the United States for the special purpose of attending the meeting of the Society and delivering an address upon "The international interest in the settlement of the Panama Canal toll question."

The second session began at 10 o'clock a. m., Friday, April 25th. The first paper scheduled was an "Historical account of Isthmian projects" by Professor E. D. Warfield, President of Lafayette College. President Warfield had the misfortune of being taken suddenly ill on his way to the meeting and was unable to continue the trip. His paper was therefore read by title, and is printed in full in the Proceedings.

It may be stated that the unavoidable absence of this speaker was the only disappointment in the program as printed and distributed to the members. There were, however, several prominent additions to the program which will be referred to later. Mr. Crammond Kennedy, of the Bar of the Supreme Court of the United States, read a paper showing a "Comparison of the relative interests of the United States and Great Britain in the Western Hemisphere at the different stages of negotiations." Mr. Chandler P. Anderson, recent Counselor of the Department of State, then read a paper on "The issues between the United States and Great Britain in regard to Panama Canal tolls as raised in the recent diplomatic correspondence," and the Honorable Richard Olney, formerly Secretary of State, contributed a paper entitled "Panama Canal Tolls legislation and the Hay-Pauncefote Treaty." The papers of both Mr. Anderson and Mr. Olney were added to the program after it was printed and do not therefore appear upon it as distributed to the members of the Society.

The printed program was then continued, and Rear Admiral Charles H. Stockton, President of George Washington University, and the Honorable Lewis Nixon, delegate of the United States to the Fourth Pan American Conference, read papers on the question "Does the expression 'all nations' in Article 3 of the Hay-Pauncefote Treaty, include the United States?" the former taking the affirmative and the latter the negative side of the question.

The same subject was continued when the Society reconvened at 2:30 o'clock on the same day, and a paper taking the affirmative view was read by Mr. Eugene Wambaugh, Professor of International Law in Harvard Law School. Upon the conclusion of the consideration of the formal papers, this question was the subject of prolonged and animated discussion by the members present. When the program was resumed, the question "Would a subsidy to the amount of the tolls granted to American ships passing through the Canal be a discrimination prohibited by the treaty?" was discussed by Mr. Horace G. Macfarland, of the Bar of the District of Columbia, who maintained the affirmative, and by Mr. William Miller Collier, of the Bar of the State of New York, formerly American Minister to Spain, who defended the negative point of view.

The meeting then adjourned until 8 o'clock in the evening of the same day. This session was opened with a paper by Professor Emory R. Johnson, United States Special Commissioner on Panama Canal

Traffic and Tolls, who considered "What is the effect of the exemption of American coastwise shipping upon Panama Canal revenues?" The same question was the subject of a paper by Mr. Norman Dwight Harris, Professor of European Diplomatic History in Northwestern University. At the conclusion of the consideration of this question, the subject "Has the United States the right to exclude from the use of the Canal any class of foreign vessels, such as railway-owned vessels?" was discussed by Mr. James W. Garner, Professor of Political Science in the University of Illinois, and Mr. John Foster Dulles, of the New York Bar.

The concluding session of the meeting began at 10 o'clock a. m., Saturday, April 26, 1913. Mr. Thomas Raeburn White of the Philadelphia Bar, considered "Is it necessary in international law that injury actually be suffered before a justiciable action arises?" The Secretary read a letter on this subject, written by the late Professor John Westlake about a month before his death, which he sent in response to an invitation to be present and participate in the proceedings. This letter, written in the hand-writing of the author, and perhaps one of the last utterances of the eminent international lawyer upon a phase of the subject to which he devoted his life, is carefully preserved in the archives of the Society and is reproduced in the Proceedings of this year. The Honorable Hannis Taylor, of the Bar of the Supreme Court of the United States, formerly Minister to Spain, read a paper entitled "The rule of treaty construction known as *rebus sic stantibus*." The closing paper of the program entitled "What is the international obligation of the United States, if any, under its treaties, in view of the British contention?" was read by Mr. Amos S. Hershey, Professor of Political Science and International Law in Indiana University.

At the business meeting of the Society, which was held immediately after the conclusion of the consideration of the papers on the program, the Committee on Codification made a progress report, and the following officers were elected to serve during the present year:

President

HON. ELIHU ROOT

Vice-Presidents

CHIEF JUSTICE WHITE	HON. WILLIAM W. MORROW
JUSTICE WILLIAM R. DAY	HON. RICHARD OLNEY
HON. P. C. KNOX	HON. HORACE PORTER
MR. ANDREW CARNEGIE	HON. OSCAR S. STRAUS
HON. JOSEPH H. CHOATE	HON. JACOB M. DICKINSON
HON. JOHN W. FOSTER	HON. WILLIAM H. TAFT
HON. GEORGE GRAY	HON. WILLIAM J. BRYAN
HON. JAMES B. ANGELL	

Members of the Executive Council to serve until 1916

HON. AUGUSTUS O. BACON, Georgia	EVERETT P. WHEELER, Esq., New York
HON. FRANK C. PARTRIDGE, Vermont	ALPHEUS H. SNOW, Esq., D. C.
PROF. LEO S. ROWE, Pennsylvania	PROF. WILLIAM R. MANNING, Texas
FREDERIC R. COUDERT, Esq., New York	PROF. JOHN H. LATANÉ, Virginia.

The Committee on the Selection of Honorary Members, for the reasons which appear in the Proceedings, recommended that action upon honorary members be passed this year. The recommendation was approved by the Society. A minute was then offered and adopted upon the death of the late Professor Westlake, who was one of the honorary members of the Society. This minute appears in the editorial in this issue devoted to Professor Westlake, p. 584.

The meeting thereupon adjourned.

The Executive Council met at 7:30 o'clock p. m., on the same day and elected the following officers and committees to serve during the coming year:

Executive Committee

HON. ELIHU ROOT	MR. ROBERT LANSING
HON. GEORGE GRAY	HON. JOHN BASSETT MOORE
PROF. GEORGE W. KIRCHWEY	PROF. GEORGE G. WILSON
HON. OSCAR S. STRAUS	

Ex-Officio

HON. JOHN W. FOSTER, Chairman
JAMES BROWN SCOTT, Esq., Recording Secretary
CHARLES HENRY BUTLER, Esq., Corresponding Secretary
HON. CHANDLER P. ANDERSON, Treasurer.

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American Journal of International Law*

JAMES BROWN SCOTT, *Editor-in-Chief*

CHANDLER P. ANDERSON	GEORGE W. KIRCHWEY
CHARLES NOBLE GREGORY	ROBERT LANSING
AMOS S. HERSHAY	JOHN BASSETT MOORE
CHARLES CHENEY HYDE	GEORGE G. WILSON
THEODORE S. WOOLSEY	

GEORGE A. FINCH, Business Manager

Committees

Standing Committee on Selection of Honorary Members: George G. Wilson, Chairman; Jackson H. Ralston, Theodore S. Woolsey.

Standing Committee on Increase of Membership: James Brown Scott, Chairman; Charles Cheney Hyde, John H. Latané, Jesse S. Reeves, Theodore S. Woolsey.

Auditing Committee: Alpheus H. Snow, Clement L. Bouvé.

Committee on Codification: Elihu Root, Chairman, ex-officio; Chandler P. Anderson, Charles Henry Butler, Lawrence B. Evans, Charles Noble Gregory, Robert Lansing, Paul S. Reinsch, Leo S. Rowe, James Brown Scott, George G. Wilson.

Committee on Publication of Proceedings: George A. Finch, Otis T. Cartwright.

Committee on Eighth Annual Meeting: James Brown Scott, Chairman; James W. Garner, Arthur K. Kuhn, Robert Lansing, Walter S. Penfield, Jackson H. Ralston, Eugene Wambaugh.

The annual banquet was held in the New Willard Hotel, Saturday evening, April 26, 1913, at 8 o'clock. Mr. Frederic R. Coudert of New York acted as toastmaster in the absence of Mr. Root. After the ban-

quet the members present had the pleasure and honor of hearing speeches delivered by the following gentlemen: His Excellency Gregers W. W. Gram, of Norway, His Excellency Jonkherr J. Loudon, Minister of the Netherlands, Honorable James L. Slayden, Member of Congress from the State of Texas, and Professor Albert Bushnell Hart of Harvard University.

The printed report of the Proceedings, including the speeches at the annual banquet, have been printed and distributed and are now in the hands of the members of the Society. There are also printed, as an appendix to the Proceedings, the treaties with reference to the Isthmian Canal, the Act of Congress and the President's memorandum and proclamation concerning tolls, and the recent diplomatic correspondence between Great Britain and the United States upon the subject. While most, if not all, of these documents have been printed from time to time in the supplements to the JOURNAL, they have been reprinted because they are constantly referred to in nearly all of the papers read at the meeting, and their inclusion in the same volume with the speeches makes reference to them ready and easy.

The meetings this year were well attended and the papers delivered were the subject of general and wide-spread comment in the press. It is believed that what may be considered as a departure in this year's proceedings, namely, the introduction into the program of questions of international law of practical interest, instead of confining it exclusively to academic discussions, has proved in every way a distinct success and a precedent which it may be well for the Society to follow in the future.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Vie Int.*, La Vie Internationale, Brussels; *Arch. dipl.*, Archives Diplomatiques, Paris; *B.*, boletin, bulletin, bollettino; *P. A. U.*, bulletin of the Pan-American Union, Washington; *Clunet*, J. de Dr. Int. Privé, Paris; *Doc. dipl.*, France, Documents diplomatiques; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *For. rel.*, Foreign Relations of the United States; *Ga.*, gazette, gaceta, gazzetta; *Cd.*, Great Britain, Parliamentary Papers; *Int.*, international, internacional, internazionale; *J.*, journal; *J. O.*, Journal Officiel, Paris; *L'Int. Sc.*, L'Internationalism Scientifique, The Hague; *Mém. dipl.*, Memorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *Martens*, Nouveau recueil générale de traités, Leipzig; *Q. dip.*, Questions diplomatiques et coloniales; *R.*, review, revista, revue, rivista; *Reichs G.*, Reichs-Gesetzblatt, Berlin; *Staats.*, Staatsblad, Netherlands; *State Papers*, British and Foreign State Papers, London; *Stat. at L.*, United States Statutes at Large; *Times*, The Times (London).

January, 1912.

- 23 GERMANY—SWITZERLAND—ITALY. Convention relating to telephone communication across Switzerland. French text: *Arch. dipl.*, 124:26.

March, 1912.

- 13 BULGARIA—SERVIA. Treaties of alliance and friendship signed. The claims arising under these treaties were reported to have been submitted to the Czar of Russia for arbitration on June 17, 1913. English summary of texts: *Morning Post* (London), June 18; *Times*, May 8, 1913.

May, 1912.

- 6 GERMANY—LUXEMBURG. Treaty of extradition additional to the treaty of March 9, 1876. *Martens*, 6:462.
21 JAPAN—SPAIN. Spanish decree carrying into effect the treaty of friendship with Japan, signed May 15, 1911. *Arch. dipl.*, 124:144.

May, 1912.

- 23 FRANCE. Convention between the Federal Railway Bureau of France and the Paris, Lyon and Mediterranean Railway for the use of the line from Geneva to La Plaine for the Paris, Lyon and Mediterranean railway trains and their entrance into the Geneva-Cornavin Station. French text: *Arch. dipl.*, 124:5.

June, 1912.

- 28 ITALY. Circular addressed by the Italian Minister for Foreign Affairs to diplomatic and consular agents on the subject of passports for islands in the Aegean occupied by Italy and Italians. French text: *Arch. dipl.*, 124:151.

July, 1912.

- 12 INTERNATIONAL. International Radio-telegraph Convention signed at London by Germany and German protectorates, United States and possessions, Argentine Republic, Austria, Hungary, Bosnia-Herzegovina, Belgium, Belgian Congo, Brazil, Bulgaria, Chile, Denmark, Egypt, Spain and Spanish colonies, France, Algeria, French Occidental Africa, French Equatorial Africa, Indo-China, Madagascar, Tunisia, Great Britain and British colonies and protectorates, South Africa, Australia, Canada, India, New Zealand, Italy and Italian colonies, Japan and Korea, Formosa, Sakhalin, Kwangtung Peninsula, Morocco, Monaco, Netherlands, Dutch Indies and Curaçao, Norway, Persia, Portugal and colonies, Russia and Russian possessions and protectorates, Republic of San Marino, Siam, Sweden, Turkey and Uruguay. French text in *Mém. dipl.*, 51:331. English Treaty, and French texts; United States Series No. 568.
- 20 FRANCE—SPAIN. French decree carrying into effect the treaty signed at Fez, March 31, 1912, for the organization of the French protectorate over Morocco. *Arch. dipl.*, 124:121.

August, 1912.

- 23 AUSTRIA. Law passed concerning protection of Red Cross emblem. *Martens*, 6:531.

October, 1912.

- 7 International Conference for the creation of an international bureau for the study of nutritious foods, held in Paris, France. *B. Rel. Ex. (Mexico)*, 34:301.

October, 1912.

- 9 AUSTRIA—RUSSIA—BAKAN ALLIES. The Austria-Russian note sent to the Balkan Allies on the subject of the Balkan war and division of Turkey in Europe. Response of Bulgaria and Servia. French text: *Arch. dipl.*, 124:98.
- 12 GERMANY—AUSTRIA—GREAT BRITAIN—FRANCE—RUSSIA—TURKEY. Collective note addressed to the Turkish Government. Response of Turkish Government. French text: *Arch. dipl.*, 124:101.
- 12 VENEZUELA. Cancellation of the claims settled by the protocols signed by Venezuela and various nations at Washington in 1903. *B. Rel. Ex.* (Venezuela), 3:769.
- 19 BULGARIA—GREECE—SERVIA—TURKEY. Note addressed to the Turkish Government by the Balkan States. French text: *Arch. dipl.*, 124:102.

November, 1912.

- 6 GREAT BRITAIN—TURKEY. Agreement between the United Kingdom and Turkey respecting commercial travellers' samples. English text: *Great Britain, Treaty Series*, No. 1, 1913.
- 13 VENEZUELA. Decree concerning claims of foreigners. *B. Rel. Ex.* (Venezuela), 3:866.
- 25 DOMINICAN REPUBLIC—UNITED STATES. Exchange of ratifications of parcel post convention signed September 21—October 9, 1912. Went into effect January 1, 1913. Spanish text. *B. Rel. Ex.* (Santo Domingo), 1:10.

December, 1912.

- 7 CUBA—MEXICO. Exchange of ratifications of parcel post convention, signed at Mexico, April 25, 1912; proclaimed by Cuba, January 2, 1913. *Gaceta Oficial* (Cuba), January 2, 1913.
- 14 FRANCE—PERU. The Peruvian Congress voted to submit to the Hague Court, the financial differences with France. *Herald of Peace*, April, 1913.
- 29 [O. S.] MONGOLIA—TIBET. Agreement provisionally signed by Dorjieff in the name of the Dalai Lama. This agreement terminates the rivalry between the Khutukhta and the Dalai Lama and enables the Dalai Lama to formally declare his independence of China. Russia disclaims all participation and knowledge of this Treaty. *Times*, February 11, July 31, 1913.

January, 1913.

- 1 Fifth Central American Peace Conference met at San José. *P. A. U.*, 36: 307.
- 4 CENTRAL AMERICAN REPUBLICS. Convention signed at San José to render effective the conventions, etc., of former Central American Conferences relating to intercommunication between the Central American Republics. *Centro-América*, 5:4.
- 10 BELGIUM—GERMANY. Exchange of ratifications at Berlin of convention signed July 6, 1912, relating to accidents to workmen and workmen's insurance. German decree promulgating convention, December 15, 1912. French and German texts: *Reichs-G.*, 1913, p. 23; *B. Usuel*, January 8, 1913.
- 15 CENTRAL AMERICAN REPUBLICS. Convention signed at San José concerning Central American consular service. *Centro-América*, 5:5.
- 16 A test message by wireless from Sayville, N. Y., received by station at Nauen, near Berlin. *R. of R.*, (N. Y.) 47:292.
- 24 CUBA—VENEZUELA. Exchange of ratifications of extradition treaty signed July 14, 1910. Spanish text: *B. Oficial* (Cuba), April, 1913.
- 30 Death of Lieutenant General den Beer Poortugael, a member of the *Institut de droit International* and author of *The Law of War* (1872), *International Maritime Law* (1888), *The Law of War and Neutrality* (1900), *The Principles of the Geneva Conference* (1906), and *The Two Peace Conferences at The Hague* (1907). These books were all written in Dutch. This *JOURNAL*, April, 1913, p. 374.

February, 1913.

- 1 FRANCE—SWITZERLAND. French decree carrying into effect the convention signed February 1, 1913, relative to the transmission of judicial and extra-judicial acts and commissions rogatory in civil matters. French text: *J. O.*, April, 23, 1913.
- 1 HOLLAND—PORTUGAL. Agree to submit the arbitration of their claims in the Island of Timor to the President of the Swiss Republic. *Q. dipl.*, 35:181. The Foreign Office of the Netherlands denies this report.
- 3 NICARAGUA—UNITED STATES. Treaty signed granting to the United States exclusive rights to construct a canal across Nicara-

February, 1913.

guia, to establish a naval base in Fonseca Bay on the Pacific Coast, and a lease for 99 years, — renewable at the pleasure of the United States, — on the Great and Little Corn Islands in the Caribbean Sea. In return the United States is to pay Nicaragua the sum of \$3,000,000 gold, payment to be made to a depository, an American banking association; this sum to be used for the construction of public works, or the benefit of public education, or the advancement of the welfare of Nicaragua, as may be determined by the two contracting parties. This treaty was signed at Managua February 8, and sent to the United States Senate February 25. It was ratified by the National Assembly of Nicaragua, February 27. *R. of R.*, (N. Y.) 47:405; *Washington Post*, June 6, 1913.

- 11 FRANCE—NETHERLANDS. Dutch decree carrying into effect the convention relating to reciprocal laws and regulations concerning maritime navigation, signed December 17, 1909; ratifications exchanged February 10, 1913. French and Dutch texts: *Staats.*, No. 51, 1913.
- 11 FRANCE—VENEZUELA. Protocol signed re-establishing diplomatic relations broken off in 1906. *Times*, February 14, 1913. Notes exchanged in *B. Rel. Ex.* (Venezuela), February, 1913; *Mém. dipl.*, 51:99. French decree promulgating protocol: *J. O.*, June 17, 1913.
- 13 FRANCE—HAITI. Decree carrying into effect convention between France and Haiti for exchange by parcel post. Convention signed July 3, 1912; ratifications exchanged July 5, 1912. French text: *Moniteur* (Haiti), March 12, 1913.
- 20 FRANCE—UNITED STATES. Two conventions signed at Washington providing for parcel post exchange between the Islands of Martinique and Guadalupe and the United States. French decree promulgating conventions, March 29, 1913. French text: *J. O.*, March 31, 1913.
- 22 CHINA—MEXICO. Mexican decree promulgating convention relating to claims of citizens of China against Mexico, signed December 17, 1910. Spanish text: *B. Rel. Ex.* (Mexico), 25:118.
- 22 NETHERLANDS—PANAMA. Decree carrying into effect the commercial convention signed at The Hague January 11, 1912. French and Dutch texts: *Staats.*, No. 76, 1913.

February, 1913.

- 23 BULGARIA—ROUMANIA. Bulgarian cabinet accepts offer of the Powers to mediate in the boundary dispute. *R. of R.*, (N. Y.) 47:416, April.

March, 1913.

- 1 PANAMA—UNITED STATES. Joint International Commission organized. First hearing March 17, 1913. *P. A. U.*, 36:577.
- 7 FRANCE—SPAIN. Chamber ratified the Franco-Morocco treaty. *Mém. dipl.*, 51:147.
- 7 BELGIUM—NETHERLANDS. Dutch decree carrying into effect the conventions relating to marriage, etc., signed July 17, 1905. *Staats.*, No. 81, 1913.
- 10 AUSTRIA—RUSSIA. Frontier forces reduced to a peace footing by exchange of notes. *Times*, March 12, 1913.
- 11 PAN-AMERICA—UNITED STATES. The President of the UNITED STATES issued a statement setting forth the friendly attitude of his administration towards Latin America. *R. of R.*, (N. Y.) 47:416, April; Spanish text: *P. A. U.*, April, 1913.
- 13 CUBA—UNITED STATES. The President of CUBA vetoed the amnesty bill objected to by the United States. This bill practically made it impossible to prosecute any person guilty of wrongdoing under the Gomez administration. *R. of R.*, (N. Y.) 47:404, 416.
- 13 NETHERLANDS—RUSSIA. Dutch decree carrying into effect the treaty for the regulation of joint-stock companies and other commercial, industrial and financial associations, signed Sept 29-Oct. 16, 1911. Dutch and French texts: *Staats.*, No. 102, 1913.
- 15 FRANCE—UNITED STATES. Agreement between the United States and France extending for five years the arbitration convention signed February 10, 1908. Signed at Washington, February 13, 1913; ratification advised by the Senate February 19, 1913; ratified by the President February 25, 1913; ratified by France, February 28, 1913; ratifications exchanged at Washington, March 14, 1913; proclaimed March 15, 1913. French and English texts: *United States, Treaty Series*, No. 577, *R of R.*, (N. Y.) 47:461: *J. O.*, April 4, 1913.
- 20 CHINA—UNITED STATES. The UNITED STATES announced its withdrawal from participation in the Chinese Six-Power Loan.

March, 1913.

- 25 TIBET. DELAI—LAMA proclaimed the independence of Tibet. *R. jaune*, 3:187, April, 1913.
- 25 GERMANY—GREAT BRITAIN. Declaration additional to the agreement of March 27, 1874, between the United Kingdom and Germany, respecting the recognition of joint stock companies, etc. *Great Britain, Treaty Series*, No. 5, 1913.
- 26 NETHERLANDS. Decree adhering to the convention of November 4, 1911, between Germany and France concerning Morocco. French text: *Staats.*, No. 115, 1913.
- 26 GREAT BRITAIN. The Lord of the Admiralty, Winston Churchill in a speech in the House of Commons offered to suspend increase of armaments for one year upon agreement with other nations. *New York Sun*, March 27, 1913. *Fort.*, 93(99):654; *Independent*, 74:732; *Lit. Dig.*, 46:882. Reply of German Chancellor von Bethmann Hollweg, April 8. English text: *Peacemaker* (London), 1:131.
- 26 GERMANY—ITALY. Convention relating to workmen's insurance, signed July 31, 1912, and the additional protocol signed March 25, 1913; ratifications exchanged, March 26, 1913; German decree promulgating convention, March 26, 1913; went into effect April 1, 1913. German and Italian texts: *Reichs-G.*, 1913, p. 171; *Times*, March 28, 1913.
- 27 GREAT BRITAIN. It was proposed in the House of Commons to furnish arms and ammunition to the merchant marine for use in time of war, the ship owners being required to provide the gun carriages, etc., but the government to provide for training the crew.
- 29 COLOMBIA—UNITED STATES. COLOMBIA refused to accept following proposals made by the United States: (1) That Colombia should grant the United States an option for the construction of an interoceanic canal, from Gulf of Uraba on the Atlantic, to the Pacific Ocean through the region of the Atrato River; (2) That Colombia should give to the United States the right to establish coaling stations in the Islands of San Andres and Providencia, in the Caribbean Sea; (3) in consideration of the above, the United States to pay Colombia \$10,000,000 and to use its good influence for the settlement of the pending differences between Colombia and Panama. Also to grant Colombia preferential rights for the use of the canal and the settlement by arbitration

March, 1913.

- of the claims of Colombia against the Panama Railroad Company. The Government of Colombia refused to accept the proposals, insisting at the same time that all questions pending between Colombia and the United States should be settled by arbitration. *Herald of Peace*, April, 1913; *Nation* (N. Y.), April 3, 1913; *Mém. dipl.*, 51:149.
- 26 Committee of the International Conference for Unification of Maritime Laws, met at Brussels. *Times*, March 19, 1913.
- 29 The European Powers inaugurated a naval demonstration against Montenegro.
- 29 BULGARIA—ROUMANIA. Conference on Balkan question met in St. Petersburg. *R. pol. et parl.*, 76:204.

April, 1913.

- 2 FRANCE—SPAIN. Ratification by Spain of treaty signed November 27, 1912, regarding Morocco. *Times*, April 6, 1913. French text: *J. O.*, April 5, 1913. French decree promulgating treaty, March 29, 1913. *J. O.*, March 30, 1913.
- 4 Death of Emanuel von Ullmann, professor of international law at the University of Munich; president of the German Association for International Conciliation; author of *Lehrbuch des Völkerrechts* and other books on international law and relations.
- 4 SPAIN. Decree modifying Article 112 of the law of September 3, 1880, relating to reciprocal protection of musical and dramatic property. French text: *Dr. d'Auteur*, 1912, p. 61; Spanish text: *Ga. de Madrid*, April 5, 1913.
- 4-9 SWITZERLAND. St. Gotthard railway convention ratified by Switzerland. The nationalization of the Swiss railways in 1897, including the St. Gotthard line, which had hitherto been a private concern, made necessary a new agreement with Italy and Germany, where large sums had been subscribed toward that line. A new convention was drawn up at Berne in 1909, and this was ratified by Germany in 1910 and Italy in June, 1912. The new arrangement extends to the whole of the Swiss federal system the most-favored nation treatment accorded to Germany and Italy on the St. Gotthard line. The convention was not well received by the Swiss people. *Times*, April 5, 10, 1913. *Q. dipl.*, 35:705.

April, 1913.

- 8 CHILE—COSTA RICA. Decree of Costa Rica carrying into effect the postal convention signed December 12, 1912. Spanish text: *La Gaceta* (Costa Rica), April 10, 1913.
- 8 CHINA. First Chinese Parliament convened at Pekin. *Mém. dipl.*, 51:226.
- 10 Balkan war. Formal declaration of the blockade of Montenegrin ports by the great powers of Europe. The blockade began at eight a. m. and extended between the harbor of Antivari and the mouth of the River Drin, from 42.06 to 45 north latitude and included all harbors, inlets, roadsteads and estuaries within these limits and the islands lying close to the coast and was against all nations. The declaration of blockade was made by Vice-Admiral Cecil Burney, on board the British ship *King Edward VII*, as commander of the international fleet. *Daily Telegraph*, London, April 11, 1913; *Q. dipl.*, 35:449.
- 10 GREAT BRITAIN—LIBERIA. Agreement respecting the navigation of the Manoh River, *Great Britain Treaty Series*, No. 6, 1913.
- 14 Death of John Westlake, formerly professor of international law at the University of Cambridge; member of the Permanent Court at The Hague 1900–1906; honorary member of the *Institut de droit International*; honorary member of the American Society of International law; author of *Treatise on Private International law, or Conflict of Laws*, 1858, 1880, 1890, 1905: *Chapters on the Principles of International Law*, 1894; *International Law: Peace; War*, 1904–1907.
- 16 BELGIUM—NETHERLANDS. Dutch decree carrying into effect the treaty signed November 18, 1911, ratifications of which were exchanged April 17, 1913, relating to the Esschen railway station control. Dutch and French texts: *Staats.*, No. 131, 1913.
- 17 UNITED STATES—PANAMA. Declaration effected by exchange of notes permitting consuls to take note, in person or by authorized representatives, of declarations of values of exports made by shippers before customs officers. *United States, Treaty Series*, No. 578.
- 18 GERMANY. Dr. Liebknecht made a speech on the floor of the Reichstag charging the agents of the Krupp and other companies with encouraging war rumors to increase trade in armaments. *Outlook*, 104:5; *Independent*, 74:946; *Contemp.* 103:804.

April, 1913.

- 20 BALKAN WAR. Armistice signed between Turkey and the Balkan Allies, except Montenegro. *Pall Mall Gazette*, April 21, 1913.
- 23 GERMANY—ITALY. Convention regulating telephone communication and service between the two countries. French text: *Arch. dipl.*, 124:22.
- 24 UNITED STATES. The Secretary of State presented to the diplomatic representatives of the various Powers at Washington, a plan for the maintenance of the peace of the world, providing that all controversies shall be submitted for investigation to an international commission before war shall be declared. *R. of R.*, (N. Y.) 47:674. Up to June 30, twenty-six nations had reported favorably.
- 24-26 Seventh annual meeting of the American Society of International Law in Washington, D. C.
- 24 FRANCE—HAITI. French decree carrying into effect the parcels post convention signed July 3, 1912, ratifications of which were exchanged February 26, 1913. French text: *J. O.*, April 30, 1913.
- 26 International Exposition opened at Ghent, Belgium. *Times*, April 28, 1913.
- 26 CHINA. An agreement for \$125,000,000 loan to China by bankers from five European nations was signed at Peking. On May 5, the Chinese National Assembly declared that the signing of the loan without the authority of Congress was unlawful. *R. of R.*, (N. Y.) 47:673, 674.
- 27 GREAT BRITAIN—VENEZUELA. Parcel post agreement between the United Kingdom and Venezuela signed at Caracas. English and Spanish text: *Great Britain Treaty Series*, No. 3, 1913.
- 28 GREAT BRITAIN—GUATEMALA. Guatemala appealed to the United States to use its good offices in the settlement of a dispute concerning the payment of bonds amounting to \$10,000,000, held in Great Britain. These bonds were guaranteed by a certain coffee tax, and when the Guatemalan Government diverted this tax to other uses, Great Britain demanded that the terms of the guaranty be complied with and the bonds paid. A British war ship was dispatched into Guatemalan waters. Guatemala asked that more time be given for settlement. Great Britain refused to alter her demands, and Guatemala thereupon repaid

April, 1913.

the tax withheld and made other arrangements satisfactory to Great Britain. *Q. dipl.*, 35:634; *R. of R.*, (N. Y.) 47:674; *Ind.* 74:1120; *Outlook*, 104:89.

- 30 BALKAN WAR. Reply of MONTENEGRO to the Powers in regard to evacuation of Scutari. Text: *Times*, May 3, 1913.
- 30 CANADA. In the Canadian Parliament the bill for an appropriation of \$35,000,000, to be used in the construction of three dreadnoughts, was lost by a vote of 27 to 51.
- 30-May 4 Fourth American Peace Congress met at St. Louis. *Ad. of Peace*, 75:124.

May, 1913.

- 2 CHINA. Recognition of China by the United States and Mexico. *Times*, May 3, 1913.
- 3 BELGIUM—BOLIVIA. Exchange of ratifications of a treaty of friendship and commerce signed April 18, 1912. French text: *Mém. dipl.*, 51:347.
- 3 GREAT BRITAIN—UNITED STATES. International conference met in New York to arrange the celebration in 1914 of the 100 years' peace between English speaking peoples.
- 3 FRANCE—ITALY. Decree carrying into effect convention signed March 19, 1913, relative to the transportation of cattle at the boundaries. French text: *J. O.*, May 14, 1913.
- 3 BRAZIL—PORTUGAL. Denunciation by Brazil of convention of 1855 relating to counterfeiting and monetary affairs. *Mém. dipl.*, 51:290.
- 3 UNITED STATES. The CALIFORNIA legislature passed the alien land law bill, which was signed by Gov. Johnson May 19. The bill provides that any alien "eligible to citizenship" may acquire and hold land, and that no other alien may own, hold, or lease for more than three years, any land, except as provided by treaty. The Ambassador of Japan entered a formal protest at the Department of State on May 9. The law went into effect August 11, 1913. *Mém. dipl.*, 51:290.
- 4 ITALY—SPAIN. Convention signed relating to Lybia and Morocco. French text: *Mém. dipl.*, 51:290, 292.
- 6 International Institute of Agriculture met in Rome. *Mém. dipl.*, 51:290.

May, 1913.

- 6 FRANCE. Appointment of a commission to investigate and report upon a plan for regulating aéronautic relations with foreign countries. *J. O.*, May 7, 1913.
- 6 FRANCE—ITALY. The Hague Court sitting in the case of France against Italy, brought for the seizure of the ships *Carthage* and *Manouba*, rendered its decision. The seizure was pronounced illegal and Italy was ordered to pay 160,000 fr. (£6,400) for the seizure of the *Carthage*, of which sum 75,000 fr. is to go to the owners of the vessel, the *Compagnie Générale Transatlantique*, 25,000 fr. to the airman Duval, and 60,000 fr. to the passengers on board and the owners of the freight. Compensation for the *Manouba* was fixed at 4,000 fr. The case of *Tavignano* will be arranged by the governments themselves. On January 16, 1912, the *Carthage*, on her way from Marseilles to Tunis, was seized by Italy because of the presence on board of M. Duval, an airman, with his aéroplane, on his way to Tunis to give exhibition flights. After landing M. Duval at Cagliari the *Carthage* was allowed to proceed. The *Manouba* was the regular mail boat and was seized on January 19, owing to the presence of 29 Turks belonging to the Red Crescent (Red Cross) service. The *Tavignano* also belonging to the *Compagnie Générale Transatlantique*, was seized. Two latter boats were released January 26. On January 26, the two countries agreed to submit the matter to The Hague and on March 31 the court met. It was composed of M. Louis Renault and Baron du Taube for France and M. Guido Fusinato and M. Krieger for Italy, *Sur arbitre M. de Hammarskjöld*. Counsel for Italy, M. Ricci Busatti, M. Anzilotti; for France, M. Fromageot and M. André Hesse. *Times*, May 7, 1913; *Q. dipl.*, 35:509.
- 11-12 FRANCE—GERMANY. A conference of members of the French and German Parliaments met at Berne to discuss the possibilities of a friendly understanding between the respective countries. It was attended by thirty-seven members of the Reichstag and 167 members of the French House of Deputies. Resolutions were adopted against increased armaments, and approving the plan for world peace proposed by the Secretary of State of the United States. *Mém. dipl.*, 51:310.
- 12 FIFTH INTERNATIONAL AMERICAN CONFERENCE. The Governing

May, 1913.

Board of the Pan-American Union selected Santiago, Chile, as the place of meeting of the Fifth International American Conference in 1914.

- 12 AUSTRIA. Austria annexed the island Ada-Keleh, in the Danube near Portes-de-Fer. This island has a population of 500 and since 1878 Austria has maintained a garrison there although the civil government has been administered under Turkey. The Turkish Governor, le cherif Eddin refused to sign the procès-verbal of annexation and left the island.
- 13 GREAT BRITAIN—UNITED STATES. A special agreement between the United States and Great Britain for the settlement of pecuniary claims was signed August 18, 1910, approved by the United States Senate July 19, 1911, and confirmed by exchange of notes, April 26, 1912. Under this agreement a tribunal met at Washington, May 13, 1913, at 3 p. m. The tribunal is composed as follows:

The Rt. Hon. Sir Charles Fitzpatrick, G. C. M. G., Chief Justice of Canada, and Hon. Chandler P. Anderson, Former Counselor of the Department of State. Umpire: M. Fromageot. Agents and counsel: Hon. Robert Lansing, Agent for the United States, Hon. Cecil J. B. Hurst, C. B., Agent for Great Britain, Hon. E. L. Newcombe, C. M. G., K. C., Deputy Minister of Justice of Canada, Associate Agent for Great Britain, Hon. J. Reuben Clark, Jr., General Counsel for the United States; Arthur P. McKinstry, Charles F. Wilson and Herbert H. H. Pierce, Junior Counsel for the United States. Joint Secretary for the United States: R. A. Young. Joint Secretary for Great Britain: A. Clark-Kerr. The first session of the Tribunal was held in Washington, May 13 to 17 and the second session was held in Ottawa, June 9 to 18. The following cases have been heard: William Hardman, Lindesfarne, Yukon Lumber, King Robert, La Canadienne, Union Bridge and Eastry. Of these the following have been decided: William Hardman, Yukon Lumber, King Robert and Lindesfarne. The first three were decided in favor of the United States and the last in favor of Great Britain.

The Tribunal adjourned June 18 to meet early in 1914.

Texts of agreement: United States Treaty Series, 572, 573.

May, 1913.

- 13 ELEVENTH INTERNATIONAL CONFERENCE on Maritime Law met at Copenhagen. *Times*, May 14, 1913.
- 14-16 NINETEENTH ANNUAL LAKE MOHONK CONFERENCE on International Arbitration was in session.
- 15 BULGARIA—ROUMANIA. Protocol relating to accession of Roumanian territory. English text signed at St. Petersburg: *Times*, May 10, 1913. *Mém. dipl.*, 51:306.
- 20-June 10 SECOND PEACE CONFERENCE on the Balkan war met in London.
- 25 GREAT BRITAIN—TURKEY. Reported that Turkey is to formally cede Cyprus to Great Britain. The island came into British possession at the close of the Russo-Turkish war, under a convention which formed part of the Treaty of Berlin in 1878, and it was stipulated that Great Britain should hold Cyprus so long as Russia occupied Kars and Batoun, and that she should protect Turkey from further Russian aggressions in Asia Minor and should pay annually to Turkey the surplus revenues of the island, ultimately arranged at £92,800 a year. In 1880 the administration was transferred from the British Foreign Office to the British Colonial Office and in 1882 a constitution with an elected council was granted to Cyprus. From its strategic position, Cyprus practically controls the Mediterranean.
- 25 BALKAN WAR. The Balkan Financial Commission met in Paris. *Times*, June 17. *Q. Dipl.*, 35:626.
- 28 ITALY—UNITED STATES. Treaty of arbitration signed extending present treaty for five years. *Mém. dipl.*, 51:338.
- 29 BELGIUM—GREAT BRITAIN. Sir Edward Grey stated that Great Britain had decided to officially recognize the annexation of Congo by Belgium. *Q. dipl.*, 37:761.
- 30 BALKAN WAR. Preliminary treaty of peace signed by the representatives of all the Balkan Allies and of Turkey in London. The Bulgarian and Turkish delegates also signed a protocol providing for the immediate removal of their respective armies from the scene of operations. The delegates arranged to meet June 2 to consider the advisability of signing an eventual annexed protocol. Text: *Mém. dipl.*, 51:342.
- 31 GREAT BRITAIN—UNITED STATES. Arbitration treaty signed

May, 1913.

extending for five years the arbitration treaty which expires June 4, 1913.

June, 1913.

- 10 ITALY—UNITED STATES. The Supreme Court of the UNITED STATES rendered its decision in the case of Porter Charlton, whose extradition for the murder of his wife at Lake Como in June, 1910, was asked for by Italy under the treaty of 1868 with the United States. Extradition was resisted on the ground that under the law of Italy, Italians could not be extradited in accordance with the treaty. The court held that by Italy having refused to perform her part of the treaty, the treaty became not void but voidable and, the Government of the United States having waived its right to denounce the treaty, it remained in force, and Charlton should be extradited.
- 11 BULGARIA—SERVIA. Bulgaria agrees to refer its differences with Servia to arbitration. *New York Herald*, June 12, 1913.
- 16 NORWAY—UNITED STATES. Treaty signed extending for another term of five years the arbitration treaty which expired June 24, 1913. *Washington Post*, May 17, 1913.
- 17 GERMANY—MEXICO. Germany recognized the Huerta administration in Mexico. *Washington Post*, June 18, 1913.
- 28 PORTUGAL—UNITED STATES. Arbitration treaty signed extending for five years arbitration treaty, which expires Nov. 14, 1913.
- 28 SWEDEN—UNITED STATES. Arbitration treaty signed extending for five years arbitration treaty, which expires Aug. 18, 1913.
- 28 JAPAN—UNITED STATES. Arbitration treaty signed extending for five years arbitration treaty, which expires Aug. 24, 1913.
- 28 CUBA. Cuban House of Representatives rejected the report of the joint committee of the Senate and House of Representatives favoring the passage of a law providing for the arbitration of the payment of claims of Great Britain, France and Germany for damages in behalf of their respective nationals during the war of 1896–1898.

INTERNATIONAL CONVENTIONS

ADHESIONS, RATIFICATIONS AND DENUNCIATIONS

AGRICULTURE, INSTITUTE OF. Rome, 1906.

Ratifications:

Paraguay.

COLLISIONS AT SEA. Brussels, September 23, 1910.

Signed by Argentine Republic, Austria, Belgium, Brazil, Chile, Cuba, Denmark, France, Germany, Great Britain, Greece, Hungary, Italy, Japan, Mexico, Netherlands, Nicaragua, Norway, Portugal, Roumania, Russia, Spain, Sweden and Uruguay.

Ratifications, up to February 1, 1913:

Austria, Belgium, France, Germany, Great Britain, Mexico, Netherlands, Roumania and Russia; Germany for German colonies, Great Britain for British colonies and protectorates.

French and Dutch texts: *Staats.*, 74, 1913; French and English texts: *Great Britain Treaty Series*, No. 4, 1913; French text: *J. O.*, March 15, 1913.

COPYRIGHT, LITERARY AND ARTISTIC PROPERTY. Berne, 1886, Paris, 1896, Berlin, Nov. 13, 1908.

Ratifications:

Austria, Belgium, Denmark, Dominican Republic, France, Germany, Great Britain, Great Britain for the Isle of Man, Haiti, Hungary, Japan, Liberia, Luxembourg, Mexico, Monaco, Netherlands, Norway, Portugal, Spain, Switzerland, Tunis, United States, Dutch East Indies, India.

French & German text: *Reichs-G.*, 1913, p. 47, 209.

COPYRIGHT, LITERARY AND ARTISTIC PROPERTY. Fourth International American Conference. Buenos Aires, August 11, 1910.

Ratifications:

Guatemala.

Dominican Republic.

INDUSTRIAL PROPERTY. Washington, June 2, 1911.

Ratifications:

France.

Germany, with reservation as to Art. 4.

Netherlands.

New Zealand.

United States.

French and English texts: *United States Treaty Series*, No. 579;French text: *J. O.*, April 20, 1913; German text: *Reichs-G.*, 1913, pp. 136, 251.**INTERNATIONAL LAW.** Third International American Conference. Rio de Janeiro, August 23, 1906.

Ratifications:

Panama.

LIBERAL PROFESSIONS. Second International American Conference. Mexico City, January 28, 1902.

Ratifications:

Costa Rica. *Bol. de Rel. Ex. (Santo Domingo)*, 1:43.**METRIC STANDARD.** Paris, May 20, 1875.

Adhesions:

Bulgaria.

Canada.

Chile.

Siam.

Uruguay.

German text: *Reichs-G.*, 1876, p. 191; *Reichs-G.*, 1913, p. 169.**NATURALIZED CITIZENS.** Third International American Conference. Rio de Janeiro, August 13, 1906.

Signed by Argentine Republic, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, United States and Uruguay.

Ratifications:

Argentine Republic, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Salvador, United States.

French, Spanish and English texts: *United States Treaty Series*, No. 575.

Ratified by the United States February 23, 1908; proclaimed January 28, 1913.

OPIUM. The Hague, January 23, 1912.

Signed by China, France, Germany, Great Britain, Italy, Japan, Netherlands, Persia, Portugal, Russia, Siam and United States.

The Opium Convention provided that the States not represented at the conference should be allowed to sign as signatory Powers. On July 1, 1913, when the Second Opium Conference met at The Hague, the convention had been signed by all the sovereign states.

PATENTS, DESIGNS, TRADEMARKS. Third International American Conference, Rio de Janeiro, August 23, 1906.

Ratifications:

Panama.

PATENTS, DESIGNS AND INDUSTRIAL MODELS. Fourth International American Conference. Buenos Aires, August 20, 1910.

Ratifications:

Cuba.
Guatemala.
Honduras.
Panama.

PECUNIARY CLAIMS. Third International American Conference. Rio de Janeiro, August 13, 1906.

Signed by Argentine Republic, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, United States and Uruguay.

Ratifications:

Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Salvador and United States.

Ratifications of the United States deposited April 23, 1907;
proclaimed January 28, 1913.

English, French and Spanish texts: *United States Treaty Series*,
No. 574.

PRIVATE INTERNATIONAL LAW. The Hague, 1905.

Ratifications:

Hungary—marriage, divorce and guardianship conventions.

B. Usuel, September 22, 1911.

Belgium. *Rechts-G.*, 1913, p. 249.

PUBLIC HYGIENE, OFFICE OF, Rome, December 9, 1907.

Ratifications:

Bolivia.

Denmark.

Mexico. *B. Usuel*, December 11, 1912.

Monaco. *Mém. dipl.* 51:154.

Netherlands

Norway.

Portugal. *R. gén. de. dr. int. public*, 20:171.

RADIOTELEGRAPH. Berlin, November 3, 1906.

Ratifications:

Argentine Republic. *B. Usuel*, January 27, 1913.

Austria-Hungary for Bosnia and Herzegovina.

Belgium for the Congo. *J. O.*, February 1, 1913.

Egypt.

Germany.

Greece.

Italy.

Japan. *B. Usuel*, March 23, 1913.

Japan for Korea, Formosa, Japanese Kwangtung and Sakhaline.

Great Britain for Newfoundland.

Morocco.

Netherlands for Curaçao.

Portugal. *B. Usuel*, November 30, 1912.

San Marino.

Siam.

Spain for Guinea.

United States.

Uruguay.

Zanzibar.

French and English texts: *United States Treaty Series*, No. 568.

RED CROSS. Geneva, July 6, 1906.

Ratifications:

Austria-Hungary, Belgium, Brazil, Germany, Great Britain
to Art. I, Honduras, Italy, Japan, Korea, Luxembourg,
Mexico, Netherlands, Norway, Portugal, Roumania, Rus-
sia, Servia, Siam, Sweden, Switzerland.

Adhesions:

Colombia, Costa Rica, Nicaragua, Paraguay, Salvador, Tur-
key (Red Crescent), Venezuela, Guatemala, Bulgaria, Bel-
gium for the Congo.

French and Dutch texts: *Staats.*, 1913, No. 113.

SALVAGE. Brussels, September 23, 1910.

Signed by Argentine Republic, Austria, Belgium, Brazil, Chile,
Cuba, Denmark, France, Germany, Great Britain, Greece,
Hungary, Italy, Japan, Mexico, Netherlands, Nicaragua,
Norway, Portugal, Roumania, Russia, Spain, Sweden,
United States and Uruguay.

Ratifications, up to February 1, 1913:

Austria, Belgium, France, Germany, Germany for German
colonies, Great Britain, Great Britain for protectorates and
colonies, Mexico, Netherlands, Roumania, Russia and
United States.

Ratifications of the United States deposited January 25, 1913,
proclaimed February 13, 1913.

English and French texts: *United States Treaty Series*, No. 576;
Great Britain Treaty Series, No. 4, 1913; French and Dutch texts:
Staats., 1913, No. 75.

SANITARY CONVENTION. Paris, December 3, 1903.

Denunciation by Netherlands for the Dutch East Indies. *R. gén.*
de dr. int. public, 20:172.

SUGAR CONVENTION. Brussels, March 17, 1912.

Ratifications:

Peru.
Sweden.
Switzerland.

Denunciations:

Great Britain will withdraw September 1, 1913.
Italy will withdraw September 1, 1913.

THE HAGUE CONVENTIONS, 1907.

Ratifications:

Cuba. Conventions I, IV, V, VI, IX, X. *J. O.*, October 27,
1912.

Guatemala. Conventions I, II (R), III-XI, XII (R), XIII (R).

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IX, X, XI (R), XIII.

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Portugal. Conventions I-VII, IX-XI, XIII, XIV.

Roumania. Conventions I-XI.

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April 30, 1913.

Sweden. Convention X.

TRADEMARKS. Fourth International American Conference. Buenos
Aires, August 20, 1910.

Ratifications:

Guatemala.
Honduras.
Panama.

TRANSPORTATION OF MERCHANTISE BY RAILROADS.

Ratifications:

Bulgaria. *B. Usuel*, November 28, 1912.

WHITE SLAVERY. Paris, May 4, 1910.

Ratifications:

Austria-Hungary.
France.

Germany.

Great Britain.

Netherlands.

Russia.

Spain.

French text: *J. O.*, April 23, 1913; French and German texts:
Reichs-G., 1912, p. 31.

WHITE (YELLOW) PHOSPHORUS IN MATCH MANUFACTURE. Berlin,
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Great Britain for New Zealand. *J. O.*, January 12, 1912.

KATHRYN SELLERS.

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Aërial Navigation Act, 1911, Bill to amend. (H. of L. Papers and Bills, Sess. 1912-1913, No. 211.) 1d. (H. of C. Bills, Sess. 1912-1913, No. 362.) 1d.

Africa. Further correspondence respecting contract labor in Portuguese West Africa. [May, 1912 to January, 1913.] (Cd. 6607.) 11½d.

Australia Navigation Bill, 1912. (Cd. 6564.) 2d.

Canada, Correspondence between the First Lord of the Admiralty and the Prime Minister of, concerning construction of war-ships. (Cd. 6689.) 1½d.

China. Despatches from H. M. Ambassador at St. Petersburgh, transmitting the Russo-Mongolian agreement and protocol of October 21 (November 3), 1912. (Cd. 6604.) 2d.

Commercial travellers' samples, Agreement between United Kingdom and Turkey respecting. Constantinople, November 6, 1912. (*Treaty series, 1913*, No. 1.) 1d.

Conference on Bills of Exchange and Cheques at The Hague, June, 1912, Correspondence relating to. (Cd. 6680.) 1s. 1d.

Congo, Correspondence respecting the affairs of [November, 1911, to January, 1913.] (Cd. 6606.) 1s. 2½d.

Copyright, International. Order in Council, March 17, 1913, amending the Order in Council of June 24, 1912, regulating copyright relations with the foreign countries of the Berne Copyright Union as regards Denmark and Japan. *Statutory Rules and Orders, 1913*, No. 330. 1½d.

¹ Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England.

—. Extending to The Netherlands. *Statutory Rules & Orders, 1913*, No. 331. 1½d.

Fleets. Return showing the fleets of Great Britain, France, Russia, Germany, Italy, Austria-Hungary, United States of America, and Japan, distinguishing the classes of vessels built and building, with date, of launch, displacement and armaments. January 1, 1913. (*H. of C. Reports and Papers*, Sess. 1912-1913, No. 537.) 10½d.

Geneva Convention Act. Order in Council, February 11, 1913. (Commonwealth of Australia.) *Statutory Rules and Orders, 1913*, No. 218. 1½d.

International conventions for unification of certain rules of law respecting collisions between vessels and assistance and salvage at sea. Signed at Brussels, September 23, 1910. (*Treaty series, 1913*, No. 4.) 3½d.

International Copyright Convention, signed at Berlin, November 13, 1908, Ratification by Denmark, July 1, 1912. (*Treaty series, 1912*, No. 26.) 1d.

International Opium Conference at The Hague, December, 1911 - January, 1912, Instructions to British delegates to. (*Cd. 6605.*) 1½d.

Italian law of nationality of June 13, 1912. Despatches from H. M. Representative at Rome respecting the. (*Cd. 6526.*) 2½d.

Joint Stock Companies, Declaration additional to the agreement of March 27, 1874, between United Kingdom and Germany, respecting the recognition of. Signed at Berlin, March 25, 1913. (*Cd. 6681.*) 1d.

Panama Canal Act, Despatch from Secretary of State at Washington to the United States chargé d'affaires respecting, communicated to H. M. Secretary of State for Foreign Affairs, January 20, 1913. (*Cd. 6585.*) 1½d.

—. Note addressed by H. M. Ambassador at Washington to the United States Secretary of State, February 27, 1913, on the subject of. (*Cd. 6645.*) 1d.

Putumayo atrocities, Report from select committee on. (*H. of C. Reports and Papers*, Sess. 1912-1913, No. 509.) 1d.

—. Report of H. M. Consul at Iquitos on his tour in Putumayo District. (*Cd. 6678.*) 4½d.

Sea fisheries (England and Wales.) By-laws under the Sea Fisheries Regulations Acts, 1888 to 1894, in force on February 1, 1913. 10d.

Sea fisheries regulations (Scotland). To provide for the suppression of illegal fishing by trawl vessels. (*H. of C. Bills*, Sess. 1913, No. 36.) 1d.

Siam, Agreement between United Kingdom and, respecting the rendition of fugitive criminals between certain states in the Malay Peninsula and Siam. Signed at Bangkok, November 20, 1912. (*Treaty series, 1913, No. 2.*) 1d.

Treaty series, Index to. (*Treaty series, 1912, No. 27.*) 1d.

United States of America, Proposed new customs tariff, with comparison of the proposed and existing rates of duty. (*Cd. 6774.*) 1s. 3d.

Venezuela, Parcel post agreement between United Kingdom and. Signed at Caracas, April 27, 1912. (*Treaty series, 1913, No. 3.*) 2½d.

UNITED STATES ²

Aliens. Executive order providing that alien laborers having passports to places other than United States shall be refused to enter continental territory of United States. February 24, 1913, 1 p. (No. 1712.) *State Dept.*

Arbitration. Agreement signed February 13, 1913, by United States and France extending for five years arbitration convention of February 10, 1908; proclaimed March 15, 1913. 4 p. [English and French.] (*Treaty series, 577.*) *State Dept.*

Arbitration, General. Lecture by Senator Henry Cabot Lodge at Naval War College extension, February 13, 1913. 12 p. Paper, 5c.

Assistance and salvage at sea, Convention between United States and other Powers concerning, signed Brussels, September 23, 1910; proclaimed February 13, 1913, 20 p. (*Treaty series, 576.*) [French and English.] *State Dept.*

Birds, Convention for protection and preservation of migratory. Report amending S. R. 25 that President be requested to propose to governments of other countries negotiation of. April 12, 1913, 1 p. (S. rp. 1.) *Foreign Relations Committee.*

Chinese, Treaty, laws and regulations governing admission of. Ed. of February 24, 1913. 63 p. Paper, 5c.

Citizens of United States, Right to protect, in foreign countries by landing forces; memorandum by Solicitor of State Department. October 5, 1912. 70 p. *State Dept.* (Information Division series M, No. 14.)

Claims, pecuniary, Convention between United States and other

² When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing office, Washington, D. C.

Powers concerning, signed Rio de Janeiro, August 13, 1906; proclaimed January 28, 1913. 7 p. (*Treaty series*, 574.) [Portuguese, Spanish, and English.] *State Dept.*

Colombia, Report on relations between United States and, March 1, 1913. 12 p. (*H. doc. 1444.*) Paper, 5c.

Fur-bearing animals in Alaska, Regulations for protection of. March 26, 1913. 3 p. (*Circular 246.*) *Commerce Dept. (Bureau of Fisheries.)*

Fur seals, Message of President on, January 8, 1913. 7 p. (*S. doc. 997.*) Paper, 5c.

Immigration, Annual report of Commissioner General of, for fiscal year 1912. 224 p. 6 pl. Paper, 20c.

Immigration laws, rules of November 15 1911. Ed. of March 10, 1913. 69 p. Paper, 10c.

Industrial property, Convention between United States and other Powers for protection of, revising Paris convention of March 20, 1883, as modified by additional act signed at Brussels, December 14, 1900: signed at Washington, June 2, 1911, proclaimed April 29. 1913. 29 p. (*Treaty series*, 579.) [French and English.] *State Dept.*

Insurrection and martial law. Opinions of Supreme Court of Appeals of West Virginia in cases of State ex rel. Mays v. Brown, Warden of State penitentiary, State ex rel. Nance v. Same, and in re Mary Jones, Charles H. Boswell, Charles Batley, and Paul J. Paulson. 1913. 71 p. (*S. doc. 43.*) Paper, 10c.

International Commission of Jurists, Report, with accompanying papers, of delegates of United States to, which met at Rio de Janeiro in June, 1912. February 5, 1913, 83 p. (*H. doc. 1343.*) Paper, 10c.

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International Congress (13th) on Alcoholism at The Hague, September, 1911. Report of United States delegates to. May 26, 1913. 15 p. (*S. doc. 44.*) Paper, 5c.

International Congress (14th) on Alcoholism, Milan, Italy, September, 1913. Report amending S. 1620 for representation of United States in. May 16, 1913. 13 p. (*S. rp. 41.*) Paper, 5c.

International law, Bibliography of, by Edwin M. Borchard, 1913. 93 p. Paper, 15c.

International sanitary convention of December 3, 1903, Convention between United States and other Powers modifying. Signed at Paris, January 17, 1913. 50 p. *Senate, Ex. C.*

Italy, Treaty between United States and, February 25, 1913, amending Article 3 of treaty of commerce and navigation of 1871. 2 p. *Senate, Ex. E.*

Latin America. Speeches of P. C. Knox, Secretary of State, on visit to countries of the Caribbean, February 23 - April 17, 1912. viii-208 p. Cloth, 35c.

Mexico, War claims against. Hearings on H. 28408, February 6 and 7, 1913. 79 p. *Foreign Affairs Committee.*

_____. Report amending H. 28408. February 8, 1913. 7 p. (*H. rp. 1485.*) *Foreign Affairs Committee.*

_____. Report favoring S. R. 62 calling for information relative to claims of citizens of United States against, for damage to person and property since beginning of Madero revolution. April 24, 1913. 1 p. (*S. rp. 13.*) *Foreign Relations Committee.*

Naturalization, Convention between United States and other Powers concerning, signed Rio de Janeiro, August 13, 1906, proclaimed January 28, 1913. 7 p. (*Treaty series, 575.*) [Portuguese, Spanish and English.] *State Dept.*

Naturalization. Memorandum prepared by Secretary of Commerce and Labor as basis for his decision in matter of foreign-born minor children of naturalized citizens. 10 p. *Commerce Dept.*

Naturalization. Status under immigration law of minor children of naturalized citizens born prior to parent's naturalization. March 31, 1913. 6 p. (Decision 1.) *Labor Dept.*

Niagara River and Niagara Falls, Hearings on bill for control and regulation of waters and preservation of Falls. January 22-24, 1913. ii + 3-113 p. *Foreign Affairs Committee.*

_____. Report favoring bill. February 8, 1913. 14 p. (*H. rp. 1488, pt. 1.*) Paper, 5c. *Foreign Affairs Committee.*

_____. Views of minority. February 25, 1913. 6 p. (*H. rp. 1488, pt. 2.*) *Foreign Affairs Committee.*

_____. Hearings. January 24 - February 17, 1913. ii + 115-167 p. *Foreign Affairs Committee.*

Nicaragua, Hearings as to alleged invasion of, by armed sailors and marines of United States, 1913. 92 p. *Foreign Relations Committee.*

North Atlantic Coast Fisheries Arbitration, Proceedings in, before Permanent Court of Arbitration at The Hague. Vol. 12, viii + 2241-2542 p. (*S. doc. 870, 61st Cong. 3d sess.*) Paper, 20c.

Panama, Declaration effected by exchange of notes between United

States and, permitting consuls to take note in person or by authorized representatives of declarations of values of exports made by shippers before customs officers; signed Washington, April 17, 1913. 3 p. (*Treaty series*, 578). *State Dept.*

Panama, Hearings on resolution relating to investigation of attitude of United States in recognizing independence of. 1913. 736 p. *Foreign Affairs Committee.*

Panama Canal. Address on issues between United States and Great Britain in regard to Panama Canal tolls, as raised in recent diplomatic correspondence, by Chandler P. Anderson. 11 p. (*S. doc. 32.*) Paper, 5c.

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_____. Address on rule of treaty construction, known as *rebus sic stantibus*, discussion of Clayton-Bulwer and Hay-Pauncefote Treaties in relation to Panama Canal, by Hannis Taylor. 8 p. (*S. doc. 31.*) Paper, 5c.

_____. Article prepared by law officer of Isthmian Canal Commission, Mr. Feuille regarding tolls on Panama Canal. 15 p. (*S. doc. 40.*) Paper, 5c.

_____. Great Britain and Panama Canal, study of tolls question, by George C. Butte. 30 p. (*S. doc. 19.*) Paper, 5c.

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_____. Hearings on S. 8114 to prevent discrimination in. February 12, 1913. 23 p. *Interoceanic Canals Committee.*

_____. Instruction of Secretary of State of January 17, 1913, to American charge d'Affaires at London, and British notes of July 8, 1912, and November 14, 1912, to which it replies, with note of February 27, 1913, from British Ambassador to Secretary of State. 21 p. (*S. doc. 11.*) Paper, 5c.

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Peace, Promotion of [with bibliography]: 1, Suggestions for observance of Peace Day, May 18, in schools; 2, Agencies and associations for

peace; compiled by Fannie Fern Andrews. 1913. 66 p. (Bulletin 12, 1913; whole No. 519.) *Bureau of Education.* Paper, 10c.

Peru, Report, with accompanying papers, concerning alleged existence of slavery in. February 7, 1913. 443 p. (*H. doc. 1366.*) Paper, 30c.

Porto Rico, Report favoring H. 20048 declaring that citizens of, and certain natives permanently residing in, shall be citizens of United States. February 24, 1913. 3 p. (*S. rp. 1300.*) *Pacific Islands and Porto Rico Committee.*

Practice of pharmacy and sale of poisons in consular districts of United States in China, Report amending by substitute S. 13, to regulate. February 19, 1913. 7 p. (*S. rp. 1267.*) Paper, 5c.

Radio communication, Regulations governing. Ed. of February 20, 1913. 14 p. Paper, 5c.

Radiotelegraphic convention, authenticated copy of, between United States and other Powers, signed London, July 5, 1912, with final protocol and service regulations connected therewith. 70 p. *Senate, Ex. A.*

Radiotelegraphic convention, London international. May 8, 1913. 31 p. il. Paper, 5c.

Samoan claims. Report concerning claims of American citizens growing out of joint naval operations of United States and Great Britain in and about Apia, Samoan Islands, March, April and May, 1899. January 10, 1913. 200 p. (*H. doc. 1262.*) Paper, 15c.

Treaties, conventions, international acts, protocols, and agreements, between United States and other Powers, supplement, 1913, to Senate document 357, 61st Cong. 2d sess., compiled by Garfield Charles: v. 3, pt. 1, Conventions in force, pt. 2, Conventions not in force. 443 + [xxii] p. il. (*S. doc. 1063, 62d Cong. 3d sess.*) *Foreign Relations Committee.*

GEO. A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

AWARD OF THE ARBITRAL TRIBUNAL OF THE PERMANENT COURT OF ARBITRATION AT THE HAGUE IN THE CASE OF THE FRENCH MAIL STEAMER "CARTHAGE"¹

May 6, 1913

Considering that, by an agreement dated January 26, 1912, and by a *compromis* dated the following 6th of March, the Government of the French Republic and the Royal Italian Government have agreed to submit to an arbitral tribunal composed of five members the decision of the following questions:

1. Were the Italian naval authorities within their rights in proceeding, as they did, to the capture and temporary seizure of the French mail steamer "Carthage"?
2. What should be the pecuniary or other consequences resulting from the decision of the preceding question?

Considering that, in accordance with this *compromis* , the two governments have chosen, by common consent, the following members of the Permanent Court of Arbitration, in order to constitute the arbitral tribunal:

His Excellency Guido Fusinato, Doctor of Law, Minister of State, former Minister of Public Instruction, Honorary Professor of International Law in the University of Turin, Deputy, Councilor of State;

Mr. Knut Hjalmar Leonard de Hammarskjöld, Doctor of Law, formerly Minister of Justice, formerly Minister of Public Worship and Instruction, formerly Envoy Extraordinary and Minister Plenipotentiary at Copenhagen, formerly President of the Court of Appeals of Jönköping, formerly Professor in the Faculty of Law of Upsala, Governor of the Province of Upsala;

Mr. Krieger, Doctor of Law, at present Confidential Counselor of

¹ Translated from pamphlet decision, in French, issued by the Permanent Court of Arbitration at The Hague.

Legation and Director in the Department of Foreign Affairs, Plenipotentiary in the German Federal Council;

Mr. Louis Renault, Minister Plenipotentiary, member of the Institute, Professor in the Faculty of Law of the University of Paris and of the *Ecole Libre des Sciences Politiques*, Jurisconsult in the Ministry of Foreign Affairs;

His Excellency Baron Michel de Taube, Doctor of Law, Assistant Minister of Public Instruction of Russia, Councilor of State;

That the two governments have, at the same time, designated Mr. de Hammarskjöld to perform the duties of President.

Considering that, in accordance with the *compromis* of March 6, 1912, the cases and counter-cases have been duly exchanged by the parties and communicated to the arbitrators;

Considering that the Tribunal, constituted as above, met at The Hague on March 31, 1913;

That the two governments have respectively appointed as agents and counsel,

The Government of the French Republic:

Mr. Henri Fromageot, Advocate in the Court of Appeals of Paris, Assistant Jurisconsult in the Ministry of Foreign Affairs, Counsel in International Law for the Navy Department, agent;

Mr. André Hesse, Advocate in the Court of Appeals of Paris, Member of the Chamber of Deputies, counsel;

The Royal Italian Government:

Mr. Arturo Ricci-Busatti, Envoy Extraordinary and Minister Plenipotentiary, Chief of the Bureau of Disputed Claims and Legislation of the Royal Ministry of Foreign Affairs, agent;

Mr. Dionisio Anzilotti, Professor of International Law in the University of Rome, counsel.

Considering that the agents of the parties have presented the following demands to the Tribunal, to-wit,

The agent of the Government of the French Republic:

MAY IT PLEASE THE TRIBUNAL

As to the first question propounded by the *compromis*,

To say that the Italian naval authorities were not within their rights in proceeding as they did to the capture and temporary seizure of the French mail steamer "Carthage";

In consequence and as to the second question,

To say that the Royal Italian Government shall be obliged to pay to the Government of the French Republic as damages:

1. The sum of one franc for the offense against the French flag;
2. The sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe international common law and conventions binding upon both Italy and France;
3. The sum of five hundred and seventy-six thousand, seven hundred and thirty-eight francs, twenty-three centimes, the total amount of the losses and damages claimed by private parties interested in the steamer and its voyage;

To say that the above-mentioned sum of one hundred thousand francs shall be paid to the Government of the Republic for the benefit of such work or institution of international interest as it may please the Tribunal to indicate;

In the second place, and in case the Tribunal does not consider itself at present sufficiently informed as to the grounds for the individual claims,

To say that one or more of its members to whom it may be pleased to entrust this duty, shall proceed, in the presence of the agents and counsel of the two governments, in the chamber where its deliberations take place, to the examination of each of the said individual claims;

In all cases, and by the application of Article 9 of the *compromis*,

To say that, after the expiration of three months from the day of the award, the sums to be paid by the Royal Italian Government and not yet paid shall bear interest at the rate of four per cent per annum.

And the agent of the Royal Italian Government:

MAY IT PLEASE THE TRIBUNAL

As to the first question propounded by the *compromis*,

To say and decide that the Italian naval authorities were entirely within their rights in proceeding, as they did, to the capture and temporary seizure of the French mail steamer "Carthage";

In consequence and as to the second question,

To say and decide that the French Government shall be obliged to pay to the Italian Government the sum of two thousand and seventy-two francs, twenty-five centimes, the amount of the expense caused by the seizure of the "Carthage";

To say that, upon the expiration of three months from the day of

the award, the sum to be paid by the Government of the French Republic will, if it has not yet been paid, bear interest at the rate of four per cent per annum.

Considering that, after the Tribunal had heard the oral statements of the agents of the parties and the explanations which they furnished upon its request, the arguments were duly declared closed.

IN THE MATTER OF FACT

Considering that the French mail steamer "Carthage," of the *Compagnie Générale Transatlantique*, in the course of a regular trip between Marseilles and Tunis, was stopped on January 16, 1912, at 6:30 a. m., in the open sea, 17 miles from the coast of Sardinia, by the destroyer "Agordat" of the Royal Italian Navy;

That the commander of the "Agordat," having ascertained that there was on board the "Carthage" an aëroplane belonging to one Duval, a French aviator, and consigned to his address at Tunis, declared to the captain of the "Carthage" that the aëroplane in question was considered by the Italian Government contraband of war;

That, as it was impossible to transfer the aëroplane from one vessel to the other, the captain of the "Carthage" received the order to follow the "Agordat" to Cagliari, where he was detained until January 20;

IN THE MATTER OF LAW

Considering that, according to the principles universally acknowledged, a belligerent warship has, as a general rule and except under special circumstances, the right to stop a neutral commercial vessel in the open sea and proceed to search it to see whether it is observing the rules of neutrality, especially as to contraband;

Considering, on the other hand, that the legality of every act which goes beyond a mere search depends upon the existence either of a trade in contraband or of sufficient reasons to believe that such a trade exists,

That, in this respect, the reasons must be of a juridical nature;

Considering that in this case the "Carthage" was not only stopped and searched by the "Agordat"; but also taken to Cagliari, sequestered and detained for a certain time, after which it was released by the administrative authority;

Considering that the purpose of the measures taken against the French mail steamer was to prevent the transportation of the aëroplane

belonging to one Duval, and shipped on the "Carthage" to the address of this same Duval at Tunis;

That this aëroplane was considered by the Italian authorities contraband of war, both by its nature and by its destination, which in reality might have been for the Ottoman forces in Tripolitana;

Considering, in so far as concerns the hostile destination of the aëroplane, an essential element of its seizability,

That the information possessed by the Italian authorities was of too general a nature and had too little connection with the aëroplane in question to constitute sufficient juridical reasons to believe in a hostile destination and, consequently, to justify the capture of the vessel which was transporting the aëroplane;

That the despatch from Marseilles, relating certain remarks of the mechanician of Mr. Duval, did not reach the Italian authorities until after the "Carthage" had been stopped and taken to Cagliari and could not, therefore, have caused these measures; that, moreover, the despatch could not in any case have been considered a sufficient reason, in the light of what has previously been said;

Considering that, this conclusion being reached, the Tribunal is not called upon to inquire whether or not the aëroplane should by its nature be included in articles of contraband, either conditionally or absolutely, or to examine whether the theory of a continuous voyage should or should not be applicable in this case;

Considering that the Tribunal finds it likewise superfluous to examine the question whether, at the time of the measures taken against the "Carthage," there were irregularities of form, and if, in case there were, these irregularities were of a kind to vitiate measures which would otherwise have been legal;

Considering that the Italian authorities demanded surrender of the mail only that it might reach its destination as quickly as possible,

That this demand, which apparently was at first misunderstood by the captain of the "Carthage," was in conformity with the Convention of October 18, 1907, *relative to certain restrictions in the exercise of the right of capture*, which, however, was not ratified by the belligerents.

Upon the request that the Royal Italian Government be condemned to pay to the Government of the French Republic as damages:

1. The sum of one franc for the offense against the French flag;
2. The sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe interna-

tional common law and conventions binding upon both France and Italy,

Considering that, in case a Power should fail to fulfil its obligations, whether general or special, to another Power, the establishment of this fact, especially in an arbitral award, constitutes in itself a serious penalty;

That this penalty is made heavier, if there be occasion, by the payment of damages for material losses;

That, as a general rule and excluding special circumstances, these penalties appear to be sufficient;

That, also, as a general rule, the introduction of a further pecuniary penalty appears to be superfluous and to go beyond the purposes of international jurisdiction;

Considering that, by the application of what has just been said, the circumstances of the present case are not such as to call for such a supplementary penalty; that, without further examination, there is no occasion to comply with the above-mentioned request.

Upon the request of the French agent that the Italian Government be condemned to pay the sum of five hundred and seventy-six thousand seven hundred and thirty-eight francs, twenty-three centimes, the total amount of the losses and damages claimed by private parties interested in the vessel and its voyage,

Considering that the request for indemnity is, in principle, justified;

Considering that the Tribunal, after having heard the concurring explanations of two of its members, charged by it to investigate the said claims, has fixed the amount due the *Compagnie Générale Transatlantique* at seventy-five thousand francs, the amount due the aviator Duval and his associates at twenty-five thousand francs, and, finally, the amount due the passengers and shippers at sixty thousand francs; making a total of one hundred and sixty thousand francs to be paid by the Italian Government to the French Government.

FOR THESE REASONS

The Arbitral Tribunal declares and pronounces as follows:

The Italian naval authorities were not within their rights in proceeding, as they did, to the capture and temporary seizure of the French mail steamer "Carthage."

The Royal Italian Government shall be obliged, within three months from the present award, to pay to the Government of the French Re-

public the sum of one hundred and sixty thousand francs, the amount of the losses and damages suffered, by reason of the capture and seizure of the "Carthage," by the private parties interested in the vessel and its voyage.

There is no occasion to give effect to the other claims contained in the demands of the two parties.

Done at The Hague, in the building of the Permanent Court of Arbitration, the 6th day of May, 1913.

President: H.J. L. HAMMARSKJÖLD.

Secretary General: MICHIELS VAN VERDUYNEN.

Secretary: RÖELL.

AWARD OF THE ARBITRAL TRIBUNAL OF THE PERMANENT COURT OF ARBITRATION AT THE HAGUE IN THE CASE OF THE FRENCH MAIL STEAMER "MANOUBA."¹

May 6, 1913

Considering that by an agreement dated January 26, 1912, and by a *compromis* dated the 6th of March following, the Government of the French Republic and the Royal Italian Government have agreed to submit to an arbitral tribunal composed of five members the decision of the following questions:

1. Were the Italian naval authorities, in general and according to the special circumstances where the act was committed, within their rights in proceeding, as they did, to the capture and the temporary seizure of the French mail steamer "Manouba," as well as to the arrest of twenty-nine Ottoman passengers who were on board?

2. What should be the pecuniary or other consequences resulting from the decision of the preceding question?

Considering that, in accordance with this *compromis* the two governments have chosen, by common consent, the following members of the Permanent Court of Arbitration in order to constitute the arbitral tribunal:

His Excellency Guido Fusinato, Doctor of Law, Minister of State, formerly Minister of Public Instruction, Honorary Professor of International Law in the University of Turin, Deputy, Councilor of State;

¹ Translated from pamphlet decision, in French, issued by the Permanent Court of Arbitration at The Hague.

Mr. Knut Hjalmar Leonard de Hammarskjöld, Doctor of Law, formerly Minister of Justice, formerly Minister of Public Worship and Instruction, formerly Envoy Extraordinary and Minister Plenipotentiary at Copenhagen, formerly President of the Court of Appeals of Jönköping, formerly Professor in the Faculty of Law of Upsala, Governor of the Province of Upsala;

Mr. Kriege, Doctor of Law, at present Confidential Counsel of Legislation and Director in the Department of Foreign Affairs, Plenipotentiary in the German Federal Council;

Mr. Louis Renault, Minister Plenipotentiary, member of the Institute, Professor in the Faculty of Law of the University of Paris and of the *École Libre des Sciences Politiques*, Jurisconsult of the Ministry of Foreign Affairs;

His Excellency Baron Michel de Taube, Doctor of Law, Assistant to the Minister of Public Instruction of Russia, Councillor of State;

That the two governments have, at the same time, designated Mr. de Hammarskjöld to perform the duties of President.

Considering that, in accordance with the *compromis* of March 6, 1912, the cases and counter-cases have been duly exchanged by the parties and communicated to the arbitrators;

Considering that the Tribunal, constituted as specified above, met at The Hague on March 31, 1913;

That the two governments, respectively, have appointed as agents and counsel,

The Government of the French Republic:

Mr. Henri Fromageot, Advocate in the Court of Appeal of Paris, Assistant Jurisconsult in the Ministry of Foreign Affairs, Counselor in International Law of the Navy Department, agent;

Mr. André Hesse, Advocate in the Court of Appeal of Paris, Member of the Chamber of Deputies, counsel;

The Royal Italian Government:

Mr. Arturo Ricci-Busatti, Envoy Extraordinary and Minister Plenipotentiary, Chief of the Bureau of Disputed Claims and of Legislation of the Royal Ministry of Foreign Affairs, agent;

Mr. Dionisio Anzilotti, Professor of International Law in the University of Rome, counsel.

Considering that the agents of the parties have presented the following demands to the Tribunal, to wit,

The agent of the Government of the French Republic:

MAY IT PLEASE THE TRIBUNAL

As to the first question propounded by the *compromis*,

To say and decide that the Italian naval authorities were not, in general and according to the special circumstances where the act was committed, within their rights in proceeding, as they did, to the capture and temporary seizure of the French mail steamer "Manouba," as well as to the arrest of twenty-nine Ottoman passengers who were on board.

As to the second question propounded by the *compromis*,

To say that the Royal Italian Government shall be obliged to pay to the Government of the French Republic the sum of one franc damages, as moral reparation for the offense against the honor of the French flag;

To say that the Royal Italian Government shall be obliged to pay to the Government of the French Republic the sum of one hundred thousand francs, as penalty and reparation for the political and moral injury resulting from the violation by the Royal Italian Government of its general and special conventional engagements, particularly the Convention of The Hague of October 18, 1907, *relative to certain restrictions on the right of capture in maritime warfare*, Article 2; the Geneva Convention of July 6, 1906, *for the amelioration of the condition of the wounded and sick in armies in the field*, Article 9; and the verbal agreement between the two governments of January 17, 1912, relative to the control of the passengers on board the steamer "Manouba;"

To say that the said sum will be paid to the Government of the Republic for the benefit of such work or institution of international interest as it shall please the Tribunal to designate;

To say that the Royal Italian Government shall be obliged to pay to the Government of the French Republic the sum of one hundred and eight thousand, six hundred and one francs, seventy centimes, the amount of the indemnities claimed by the private individuals interested either in the steamer "Manouba" or in its voyage;

Further, and in case the Tribunal does not consider itself sufficiently enlightened upon this last count,

To say, before coming to a decision, that one or more of its members, whom it shall commission for that purpose, shall proceed, in the chamber where its deliberations take place, to examine the claims of the private individuals interested;

In any case, and by the application of Article 9 of the *compromis*,

To say that, upon the expiration of three months from the date of the award, the sums which the Royal Italian Government is to pay and which shall not have been paid shall bear interest at the rate of four per cent per annum.

And the agent of the Royal Italian Government:

MAY IT PLEASE THE TRIBUNAL

As to the first question propounded by the *compromis*,

To say and decide that the Italian naval authorities were fully within their rights in proceeding, as they did, to the capture and temporary seizure of the French mail steamer "Manouba," as well as to the arrest of the twenty-nine Ottoman passengers who were suspected of being soldiers and whose true character the Italian Government had the right to ascertain.

Consequently and as to the second question,

To say and decide that no pecuniary or other consequence should be imposed upon the Italian Government because of the capture and temporary seizure of the French mail steamer "Manouba";

To say and decide that the French Government was wrong in its contention that the Ottoman passengers who fell legally into the hands of the Italian authorities should be surrendered to the French Government;

To say that the Government of the French Republic shall be obliged to pay to the Royal Government the sum of one hundred thousand francs as a penalty and reparation for the material and moral injury resulting from the violation of international law, especially in so far as the right of the belligerent to ascertain the character of individuals suspected of being soldiers of the enemy, who were found on board neutral commercial vessels, is concerned;

To say that the said sum shall be paid to the Royal Italian Government, to be devoted to such work or such institution of international interest as it shall please the Tribunal to indicate;

Further and in case the Tribunal should not consider that this kind of penalty should be admitted;

To say that the Government of the Republic shall be bound to make amends for the wrong done the Royal Italian Government in such manner as it shall please the Tribunal to indicate;

In any event,

To say that the Government of the Republic shall be obliged to pay

to the Royal Italian Government the sum of four hundred and fourteen francs, forty-five centimes, the expenses incurred on account of the seizure of the "Manouba";

To say that, upon the expiration of three months from the date of the award, the sums to be paid by the Government of the Republic and not yet paid shall bear interest at the rate of four per cent per annum.

Considering that, after the Tribunal had heard the oral statements of the agents of the parties and the explanations which they furnished at its request, the arguments were duly declared closed.

IN THE MATTER OF FACT:

Considering that the French mail steamer "Manouba," of the *Compagnie de Navigation Mixte*, in the course of a regular trip between Marseilles and Tunis, was stopped in the waters of the Island of San Pietro on the 18th of January, 1912, about eight o'clock in the morning, by the torpedo boat destroyer "Agordat" of the Royal Italian Navy;

Considering that, after ascertaining the presence of twenty-nine Turkish passengers on board the said steamer, which passengers were suspected of belonging to the Ottoman army, the "Manouba" was captured and conducted to Cagliari;

Considering that, having arrived at this port on the same day, about five o'clock in the evening, the captain of the "Manouba" was summoned to deliver the above-mentioned passengers to the Italian authorities and that, upon his refusal, these authorities proceeded to seize the steamer;

Considering, finally, that, upon the request of the Vice-Consul of France at Cagliari, the twenty-nine Turkish passengers were delivered to the Italian authorities on January 19 at half past four in the afternoon, and that the "Manouba" was then released and resumed its trip to Tunis on the same day at 7:20 p. m.

IN THE MATTER OF LAW:

Considering that, if the French Government believed, given the circumstances under which the presence of Ottoman passengers on board the "Manouba" was made known to it, that, taking into consideration the promise that the character of the said passengers would be verified, the "Manouba" was exempted from the right of search or coercion on the part of the Italian naval authorities, it is established

that the Italian Government did not in good faith understand the matter in the same way;

That, consequently, in the absence of a special agreement between the two governments, the Italian naval authorities were justified in acting according to the common law;

Considering that, according to the tenor of the *compromis*, the proceeding of the Italian Government includes three successive phases, to wit: the capture, the temporary seizure of the "Manouba," and the arrest of the twenty-nine Turkish passengers who were on board;

That it is proper to examine in the first place the legality of each of these three phases, considered as isolated acts and independent of the above-mentioned proceeding as a whole;

In this order of things,

Considering that the Italian naval authorities had, at the time of the capture of the "Manouba," sufficient reason to believe that the Ottoman passengers who were on board were, some of them at least, soldiers enlisted in the enemy's army;

That, consequently, these authorities had the right to compel the surrender of these passengers to them;

Considering that they had a right to summon the captain to deliver them, as well as to take the measures necessary to compel him to do so, or to take possession of these passengers in case of his refusal;

Considering, on the other hand, that, even admitting that there might have been grounds for believing that the Ottoman passengers formed a military troop or detachment, there was no reason for calling in question the good faith of the owner and of the captain of the "Manouba";

Considering that, under these circumstances, the Italian naval authorities were not within their rights in capturing the "Manouba" and in compelling it to leave its course and follow the "Agordat" to Cagliari, unless it were for the purpose of arrest after the captain had refused to obey a summons to surrender the Ottoman passengers;

That no summons of that kind having been made before the capture, the act of capturing the "Manouba" and taking it to Cagliari was not legal;

Considering that, as the summons made at Cagliari was without immediate effect, the Italian naval authorities had the right to take the necessary measures of compulsion, and specifically, to detain the "Manouba" until the Ottoman passengers were delivered to them;

That the seizure effected was legal only to the extent of a temporary and conditional sequestration;

Considering, finally, that the Italian naval authorities had the right to compel the surrender of the Ottoman passengers and to arrest them.

In so far as the proceeding as a whole is concerned,

Considering that the three phases, of which the single proceeding provided for by the *compromis* is composed, should be judged by themselves, and the illegality of any one of them should not, in this case, have any bearing on the regularity of the others;

That the illegality in capturing and taking the "Manouba" to Cagliari did not vitiate the successive phases of the act;

Considering, moreover, that the capture could not be legalized by the regularity, relative or absolute, of these last phases considered separately.

Upon the request that the Royal Italian Government be condemned to pay as damages:

1. The sum of one franc for the offense against the French flag;
2. The sum of one hundred thousand francs as reparation for the moral and political injury resulting from the failure to observe international common law and the conventions which are mutually binding upon both Italy and France,

And upon the request that the Government of the French Republic be condemned to pay the sum of one hundred thousand francs as a penalty and reparation for the material and moral injury resulting from the violation of international law, specifically in so far as concerns the right of the belligerent to verify the character of individuals suspected of being soldiers of the enemy, who are found on board neutral vessels of commerce,

Considering that, in case a Power has failed to fulfil its obligations, whether general or special, to another Power, the establishment of this fact, especially in an arbitral award, constitutes in itself a severe penalty;

That this penalty is increased, if there be occasion, by the payment of damages for material losses;

That, as a general proposition and leaving out of consideration special circumstances, these penalties appear to be sufficient;

That, also as a general rule, the imposition of a further pecuniary penalty appears to be superfluous and to go beyond the objects of international jurisdiction;

Considering that, by the application of what has been stated, the circumstances of the present case do not justify such supplementary penalty; that, without further examination, there is no reason for complying with the above-mentioned requests.

Upon the request of the French agent that the Royal Italian Government be compelled to pay to the Government of the French Republic the sum of one hundred and eight thousand, six hundred and one francs, seventy centimes, the amount of the indemnities claimed by private individuals interested either in the steamer "Manouba" or in its voyage;

Considering that an indemnity is due on account of the delay occasioned to the "Manouba" by its unwarranted capture and its convoy to Cagliari, but that the delay caused by the illegal refusal of the captain to surrender the twenty-nine Turkish passengers at Cagliari, as well as the fact that the vessel was not taken entirely out of its course to Tunis, should be taken into account;

Considering that, if the Italian naval authorities effected the seizure of the "Manouba" at the place of its temporary and conditional sequestration, which was legal, it appears that, in this matter, the interested parties suffered no losses and damages;

Considering that, taking account of these circumstances and also of the expense incurred by the Italian Government in guarding the detained vessel, the Tribunal, after having heard the concurring explanations of two of its members charged by it with the investigation of the said claims, has decided upon four thousand francs as the amount due all those interested in the vessel and its voyage.

FOR THESE REASONS

The Arbitral Tribunal

Declares and pronounces as follows:

In so far as the proceeding as a whole, which is covered by the first question propounded by the *compromis*, is concerned,

The different phases of this proceeding should not be considered as connected with each other in the sense that the character of any one of them, in this case, should not affect the character of the others.

In so far as the various phases of the said proceeding considered separately are concerned,

The Italian naval authorities were not, in a general way and according to the special circumstances under which the act was committed,

within their rights in proceeding, as they did, to the capture of the French mail steamer "Manouba" and its convoy to Cagliari;

When once the "Manouba" was captured and taken to Cagliari, the Italian naval authorities were, in general and according to the special circumstances under which the act was committed, within their rights in proceeding, as they did, to the arrest of the twenty-nine Ottoman passengers who were on board.

In so far as concerns the second question propounded by the *compromis,*

The Royal Italian Government shall be obliged, within three months from the present award, to pay to the Government of the French Republic the sum of four thousand francs, which, after deducting the amount due the Italian Government for guarding the "Manouba" is the amount of the losses and damages sustained, by reason of the capture of the "Manouba" and its convoy to Cagliari, by the private individuals interested in the vessel and its voyage. There is no occasion to comply with the other claims contained in the demands of the two parties.

Done at The Hague, in the building of the Permanent Court of Arbitration, May 6, 1913.

President: H. J. L. HAMMARKSJÖLD.

Secretary General: MICHELS VAN VERDUYNEN.

Secretary: RÖELL.

CHARLTON EXTRADITION CASE [CHARLTON V. KELLY]

Supreme Court of the United States

June 10, 1913.

This is an appeal from a judgment dismissing a petition for a writ of *habeas corpus* and remanding the petitioner to custody under a warrant for his extradition as a fugitive from the justice of the Kingdom of Italy.

The proceedings for the extradition of the appellant were begun upon a complaint duly made by the Italian Vice-Consul, charging him with the commission of a murder in Italy. A warrant was duly issued by the Hon. John A. Blair, one of the judges of New Jersey, qualified to sit as a committing magistrate in such a proceeding, under section 5270, Revised Statutes. At the hearing, evidence was produced which satisfied Judge Blair that the appellant was a fugitive from justice and that

he was the person whose return to Italy was desired, and that there was probable cause for holding him for trial upon the charge of murder, committed there. He thereupon committed the appellant, to be held until surrendered under a warrant to be issued by the Secretary of State. A transcript of the evidence and of the findings was duly certified as required by section 5270, Revised Statutes, and a warrant in due form for his surrender was issued by the Secretary of State. Its execution has, up to this time, been prevented by the *habeas corpus* proceedings in the court below and the pendency of this appeal.

The procedure in an extradition proceeding is that found in the treaty under which the extradition is demanded, and the legislation by Congress in aid thereof. Thus, Article I of the treaty with Italy of 1868, (vol. 1, Treaties, Conventions, etc., of the United States, 1910, p. 966) reads as follows:

The Government of the United States and the Government of Italy mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties shall seek an asylum or be found within the territories of the other; Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

One of the crimes specified in the section following is murder.

By Article V it is provided that:

When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The President of the United States, or the proper executive authority in Italy, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. It should then be decided that, according to law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases.

That article was amended by the additional treaty of 1884, (vol. 1, Treaties and Conventions, p. 985) by a clause added in these words:

Any competent judicial magistrate of either of the two countries shall be authorized after the exhibition of a certificate signed by the Minister of Foreign Affairs (of Italy) or the Secretary of State (of the United States) attesting that a requisition

has been made by the Government of the other country to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime for which pursuant to this Convention, extradition may be granted, and on complaint duly made under oath by a person cognizant of the fact, or by a diplomatic or consular officer of the demanding Government, being duly authorized by the latter, and attesting that the aforesaid crime was thus perpetrated, to issue a warrant for the arrest of the person thus inculpated, to the end that he or she may be brought before the said magistrate, so that the evidence of his or her criminality may be heard and considered; and the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence as above provided; if, however, the requisition, together with the documents above provided for, shall not be made, as required, by the diplomatic representative of the demanding Government, or, in his absence, by a consular officer thereof, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty.

Mr. Justice LURTON, after making the foregoing statement, delivered the opinion of the court.

A writ of *habeas corpus* cannot be used as a writ of error. If Judge Blair had jurisdiction of the person of the accused and of the subject-matter, and had before him competent legal evidence of the commission of this crime with which the appellant was charged in the complaint, which, according to the law of New Jersey, would justify his apprehension and commitment for trial if the crime had been committed in that State, his decision may not be reviewed on *habeas corpus*. *Terlinden v. Ames*, 184 U. S. 270, 278; *Bryant v. United States*, 167 U. S. 104; *McNamara v. Henkel*, 226 U. S. 520.

By a stipulation filed in the case for the purpose of this review, it is agreed that the evidence presented to Judge Blair of the murder with which the accused was charged, and of his criminality was sufficient to meet the treaty and statutory requirements of the case, and the errors assigned in this court questioning its legality and competency, as well as those as to the alleged absence of a warrant or deposition upon which such warrant was issued, have been withdrawn. But neither this stipulation, nor the withdrawal of the assignments of error referred to is to affect any of the matters raised by other objections pointed out in other assignments.

The objections which are relied upon for the purpose of defeating extradition may be conveniently summarized and considered under four heads:

1. That evidence of the insanity of the accused was offered and excluded.

2. That the evidence of a formal demand for the extradition of the accused was not filed until more than forty days after the arrest.
3. That appellant is a citizen of the United States, and that the treaty in providing for the extradition of "persons" accused of crime does not include persons who are citizens or subjects of the nation upon whom the demand is made.
4. That if the word "person" as used in the treaty includes citizens of the asylum country, the treaty, in so far as it covers that subject, has been abrogated by the conduct of Italy in refusing to deliver up its own citizens upon the demand of the United States, and by the enactment of a municipal law, since the treaty, forbidding the extradition of citizens.

We will consider these objections in their order:

1. Was evidence of insanity improperly excluded?

It must be conceded that impressive evidence of the insanity of the accused was offered by him and excluded. It is now said that this ruling was erroneous. But if so, this is not a writ of error and mere errors in the rejection of evidence are not subject to review by a writ of *habeas corpus*: *Benson v. McMahon*, 127 U. S. 457, 461; *Terlinden v. Ames*, 184 U. S. 270, 278; *McNamara v. Henkel*, *supra*. In the McNamara case, certain depositions had been received for the prosecution over objection. This court said that there was legal evidence on which to base the action of the commissioner in holding the accused for extradition, irrespective of the depositions objected to.

But it is said that the Act of 1882, 22 Statutes, 215, section 3, requires that the defendant's witnesses shall be heard. That section is mostly inartificially drawn. It reads as follows:

That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States.

The contention is that the effect of this provision is to give the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty. To this we cannot agree.

The prime purpose of the section is to afford the defendant the means for obtaining the testimony of witnesses and to provide for their fees. In no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing. True, the statute speaks of evidence "material for his defense, without which he cannot go safely to trial," but we cannot discover that Congress intended to depart from the provisions of the 1st article of the treaty which requires that a surrender shall be made "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment, if the crime had been there committed." The provision is common to many treaties, and Congress, by section 5270, Revised Statutes, has, in aid of such treaties, prescribed the procedure upon such a hearing in these words:

Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Judge Blair made the certificate in form and substance in conformity with the statute, and upon the receipt of that, a warrant was duly issued for the surrender of the appellant to the agents of the Italian Government.

In *Benson v. McMahon, supra*, this court said of a similar provision in the treaty with Mexico, in connection with section 5270 Revised Statutes,—

Taking this provision of the treaty and that of the Revised Statutes above recited, we are of opinion that the proceeding before the commissioner is not to be regarded

as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations, which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that "the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." This prescribes the proceedings in these preliminary examinations as accurately as language can well do it. The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty, he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress, and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government.

To repeat, the Act of 1882 does not prescribe the extent to which evidence thus obtained shall be admitted, and we quite agree with the view expressed by Judge Brown, in *In re Wedge*, 15 Federal, 864, who said:

The phrase in section 3 of the Act of 1882 "that he, (the accused) cannot safely go to trial without them" (witnesses) cannot be construed as giving a right to a full trial in violation of treaty stipulations; but it must be confined to such a preliminary hearing only as was already allowable under the existing practice, viz., such as was appropriate to a hearing having reference only to a commitment for future trial.

There is not and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the state makes a *prima facie* case of guilt sufficient to make it proper to hold the party for trial. Such committing trials, if they may be called trials in any legal sense, are usually regulated by local statutes. Neither can the courts be expected to bring about uniformity of practice as to the right

of such an accused person to have his witnesses examined, since if they are heard, that is the end of the matter, as the ruling cannot be reversed.

In this case the magistrate refused to hear evidence of insanity. It is claimed that because he excluded such evidence, the judgment committing appellant for extradition is to be set aside as a nullity, and the accused set at liberty. At most the exclusion was error not reversible by *habeas corpus*. To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the government. This distinction was taken by Mr. Justice Washington in the case of *United States v. White*, 4 Washington C. C. 414, when he said:

Generally speaking, the defendant's witnesses are not examined upon an application to bind him over to answer upon a criminal charge. The defendant's witnesses are never sent to the grand jury, except where the attorney for the prosecution consents thereto. But in this incipient stage of the prosecution, the judge may examine witnesses who were present at the time when the offence is said to have been committed, to explain what is said by the witnesses for the prosecution; and the cross-examination of the witnesses for the prosecution is certainly improper.

We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. By the law of New Jersey, insanity as an excuse for crime is a defense, and the burden of making it out is upon the defendant. *Graves v. States*, 45 N. J. L. 203; *State v. Maioni*, 78 N. J. L. 339, 341; *State v. Peacock*, 50 N. J. L. 34, 36. A defendant has no general right to have evidence exonerating him go before a grand jury, and unless the prosecution consents, such witnesses may be excluded: 1 Chitty Crim. Law, 318; *United States v. White*, *supra*; *Respublica v. Shaffer*, 1 Dallas, 255; *United States v. Palmer*, 2 Cranch Circuit Court, 11; *United States v. Terry*, 39 Federal 355, 362.

2. It is next objected that no formal demand for the extradition of the appellant was made within forty days after his arrest, and that he was therefore entitled to be set at liberty. The objection is founded upon the supplemental convention with Italy of 1884, heretofore set out.

A "certificate," such as was indicated by that convention, was undoubtedly "exhibited" to the committing magistrate, and was the basis of his action. The other parts of the provision are not clear. What is referred to by the phrase, "the requisition, together with the documents above provided," etc., which is required to be made within forty days, or the person set at liberty? The "certificate" attesting "that a requisition has been made," etc., was "exhibited" to Judge Blair; and we fail to find in this clause of the treaty any requirement that the subsequent "formal demand" for the extradition shall be filed with the magistrate within forty days after the arrest of the accused, or at any other time. The whole of the convention should be read together and in connection with section 5270 Revised Statutes, which is applicable to all treaties. Under section 5270 any one of the judicial officers named therein, may, upon complaint, charging one of the crimes named in the treaty, issue his warrant of arrest and hear the evidence of criminality. This done, his duty is, if he deems the evidence sufficient to hold the accused for extradition, to commit him to jail, and to certify his conclusion, with the evidence, to the Secretary of State, who may then, "upon the requisition of the proper authorities of such foreign government, issue his warrant for the surrender of the accused." Revised Statutes, sections 5272, 5273. Of course, the effect of the supplementary treaty of 1884, being later than the statutory requirements above referred to, is to supersede the statute in so far as there is a necessary conflict in the carrying out of the extradition obligation between this country and Italy. But, as observed in *Grin v. Shine*, 187 U. S. 181, 191, "Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro v. DeUriarte*, 16 Fed. Rep. 93. This appears to have been the object of section 5270, which is applicable to all foreign governments with which we have treaties of extradition." This section, by its very terms, applies "in all cases in which there now exists or hereafter may exist, any treaty or convention for extradition." Had there been no law of Congress upon the subject, the method of procedure prescribed by the supplementary treaty of

1884 would necessarily have been the proper one, and the committing magistrate could have proceeded only according to the treaty, for that would have been the only law of the land applicable to the case and the only source of his authority.

It was therefore competent for Judge Blair to act upon the complaint made before him independently of any preliminary mandate or certificate, such as was in fact issued and "exhibited" to him in this case, being plainly authorized so to do by the terms of section 5270. The personal rights of the accused are saved by the provisions of the same section, since he could only have been surrendered upon the warrant of the Secretary of State, based upon the evidence presented upon the hearing, and the conclusion of the sufficiency of the evidence of criminality certified to the Secretary of State, and upon a formal requisition for extradition. *Castro v. DeUriarte*, 16 Federal, 93, 97; *Grin v. Shine*, *supra*.

Construed in the light of the original and supplementary conventions with Italy and of section 5270 Revised Statutes, we do not find that it was obligatory that the "formal demand" referred to in the 1884 clause should be proven in the preliminary proceeding within forty days after the arrest. That is a demand made upon the executive authority of the United States by the executive authority of Italy. Its presentation was not necessary to give the examining magistrate jurisdiction. Such a formal demand was in fact made on July 28, 1910, less than forty days after the arrest. That, together with the certificate of the magistrate and the evidence submitted to him, was the authority of law under which the Secretary of State issued his warrant of extradition. Every requirement of the law, whether it appears in the treaty or in the Act of Congress, was substantially complied with. This was the construction placed upon the treaty by Mr. Secretary Knox in answer to the same objection made to him before he issued his warrant, and also of Judge Rellstab, who dismissed the petition for a writ of *habeas corpus* and from whose decree this appeal comes.

3. By Article I of the extradition treaty with Italy the two governments mutually agree to deliver up all persons, who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other, etc. It is claimed by counsel for the appellant that the word "persons" as used in this article does not include persons who are citizens of the asylum country.

That the word "persons" etymologically includes citizens as well as those who are not, can hardly be debatable. The treaty contains no reservation of citizens of the country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary, as by implication from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included. This was the position taken by the Foreign Minister of Italy in a correspondence in 1890 with the Secretary of State of the United States, concerning a demand made by the United States for the extradition of Bevivini and Villella, two subjects of Italy whose extradition was sought, that they might be tried for a crime committed in this country. Their extradition was refused by Italy on account of their Italian nationality. The Foreign Minister of Italy advanced in favor of the Italian position these grounds: (a) That the Italian Penal Code of 1890, in express terms provided that, "the extradition of a citizen is not permitted;" (b) That a crime committed by an Italian subject in a foreign country was punishable in Italy, and, therefore, there was no ground for saying that unless extradited the crime would go unpunished; and (c) That it has become a recognized principle of public international law that one nation will not deliver its own citizens or subjects upon the demand of another, to be tried for a crime committed in the territory of the latter, unless it has entered into a convention expressly so contracting, and that the United States had itself recognized the principle in many treaties by inserting a clause exempting citizens from extradition. (United States Foreign Relations, 1890, p. 555.) Mr. Blaine, then Secretary of State of the United States, protested against the position of the Italian Government and maintained the view that citizens were included among the persons subject to extradition unless expressly excluded. His defense of the position is full and remarkably able. It is to be found in United States Foreign Relations for 1890, pp. 557, 566.

We shall pass by the effect of the Penal Code in preventing the authorities of Italy from carrying out its international engagements to surrender citizens, for that has no bearing upon the question now under consideration, which is, whether under accepted principles of international law, citizens are to be regarded as not embraced within an extradition treaty unless expressly included. That it has come to be the practice with a preponderant number of nations to refuse to deliver its citizens, is true; but this exception is convincingly shown by Mr.

Blaine in his reply to the Foreign Minister of Italy and by the thorough consideration of the whole subject by Mr. John Bassett Moore, in his treatise on extradition, ch. V. pp. 152, 193, to be of modern origin. The beginning of the exemption is traced to the practice between France and the Low Countries in the 18th century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of "persons," without limitation or qualification are the following:

With Great Britain, November 10, 1842, extended July 12, 1889,
United States Treaties, 1910, pp. 650 and 740.

With France, April 13, 1844, *supra*, p. 526.

With Italy, February 8, 1868, *supra*, p. 961.

With Venezuela, August 27, 1860, *supra*, p. 1845.

With Ecuador, 1892, *supra*, p. 436.

With Dominican Republic, 1867, *supra*, p. 413.

The treaty with Japan of 1886, *supra*, p. 1025, contains a qualification in these words:

Art. VII. Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this convention, but they shall have the power to deliver them up, if in their discretion it be deemed proper to do so.

The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude will be considered later. But that the United States has always construed its obligation as embracing its citizens is

illustrated by the action of the executive branch of the government in this very instance. A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.

The subject is summed up by Mr. John Bassett Moore in his work on extradition, vol. 1, p. 170, sec. 138, where he says:

"Persons" includes citizens. In respect to the persons to be surrendered, the extradition treaties of the United States all employ the general term "persons," or "all persons." Hence, where no express exception is made, the treaties warrant no distinction as to nationality. Writing on the general subject of the extradition treaties of the United States and the practice thereunder, Mr. Seward said: "In some of the United States' extradition treaties it is stipulated that the citizens or subjects of the parties shall not be surrendered. Where there is no express reservation of the kind, there would not, it is presumed, be any hesitation in giving up a citizen of the United States to be tried abroad." Such has been the uniform and unquestioned practice under the treaty with Great Britain of 1842, in which the term "all persons" is used.

The effect of yielding to the interpretation urged by Italy would have brought about most serious consequences as to other treaties then in force. One of these was the extradition treaty with Great Britain made as far back as 1843. Inasmuch as under the law of that country, as of this, crimes committed by their citizens within the jurisdiction of another country were punishable only where the crime was committed, it was important that the Italian interpretation should not be accepted.

4. We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality, the treaty has thereby ceased to be of obligation on the United States. The attitude of Italy is indicated by its Penal Code of 1900 which forbids the extradition of citizens, and by the denial in two or more instances to recognize this obligation of the treaty as extending to its citizens.

During a preliminary correspondence between the Department of State and the Italian Charge d'Affaires, in reference to the provisional arrest and detention of the appellant under Articles I and II of the treaty, as extended by Article II of the additional convention of 1884, Mr. Knox, the then Secretary of State, inquired, "whether or not the department is to understand that by initiating extradition proceedings for the surrender of this American citizen accused of committing murder in Italy, your Government wishes to be understood as surrendering its

view heretofore entertained, and as being now willing to adopt as to cases which may hereafter arise between the two Governments, the view that the Extradition Treaties of eighteen sixty-eight, eighteen sixty-nine and eighteen eighty-four between the United States and Italy, require the surrender by each Government, of any and all persons, irrespective of the nationality, who having been convicted for or charged with, commission of any of the crimes specified in the treaty within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other, and further and specifically to inquire whether the Government of Italy now proposes as to all cases arising in the future, to deliver to the Government of the United States under and in accordance with the Treaty provisions those Italian subjects who committing crimes in the United States take refuge in Italy."

The reply to this was as follows:

JULY 1, 1910.

MR. SECRETARY OF STATE: By telegram of June 24, last, your Excellency inquired whether in instituting extradition proceedings in the case of Porter Charlton, who confessed having committed murder at Moltrasio, the King's Government intended to depart from the rule, heretofore observed, not to surrender its own subjects and whether it was to be inferred that Italians guilty of an offense committed on American territory, who should take refuge in Italy, should hereafter be delivered without fail to the American Government.

I now have the honor to inform Your Excellency that the King's Government cannot depart from the principle established by our law that our nationals cannot be surrendered to foreign powers. Furthermore, this principle does not conflict with the provisions of the Extradition Convention. Indeed it seems logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation.

The Italian law does not consent to the extradition of nationals, but the Italian courts are competent to try on the request of a foreign Government, their nationals who may have committed offenses on that Government's Territory.

Contrariwise, the laws of the United States by not permitting local tribunals to try American citizens for offenses committed abroad seem to admit of their being extradited. Otherwise an offender would, under the egis of the law itself, escape the punishment he deserves.

I have the honor to inform your Excellency that the requisite extradition papers in the case of Porter Charlton will be forwarded to me without delay and in the meanwhile I beg you kindly to cause the prisoner to be held in provisional detention.

On July 28, 1910, the following communication was addressed to the Secretary of State, and was received on July 30, 1910:

MR. SECRETARY OF STATE: Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have the honor to lay before your Excellency a formal request for the extradition of Porter Charlton who has confessed the crime of murder committed on the person of his own wife at Moltrasio, Como, which crime is specified in Article II, Section 1 of the said Convention.

Your Excellency has already been so good as to forward to me, in note No. 864 of June 28 last, the preliminary certificate of arrest provided by Article II of the Additional Convention of June 11, 1884, with a view to the provisional arrest of the above named accused.

In support of this request, I have the honor to transmit herewith to Your Excellency the record of proceedings conducted by the Court of Como in the case of the aforesaid murder. The papers are regularly vissed by the Embassy of the United States at Rome.

Awaiting the Federal "warrant" and the kind return of the enclosed papers for submission to the competent court, I avail myself of this opportunity to renew to Your Excellency, together with my thanks in advance, the assurance of my highest consideration.

To this the Secretary of State, after the conclusion of the hearing before Judge Blair and the receipt by the Department of his judgment and the evidence produced before him, replied as follows:

WASHINGTON, December 10, 1901.

EXCELLENCY: In compliance with the request made by your Embassy in its note of July 28 last, and in pursuance of existing treaty stipulations between the United States and Italy, I have the honor to enclose a warrant of surrender in the case of Porter Charlton, charged with murder, committed within the jurisdiction of the Kingdom of Italy, and examined and committed for surrender by the Honorable John A. Blair, Judge of the Court of Common Pleas in and for the County of Hudson, in the State of New Jersey.

Accept, Excellency, the renewed assurance of my highest consideration.

The attitude of the Italian Government indicated by proffering this request for extradition "in accordance with Article V of the Treaty of 1868," is, as shown by the communication of July 1st set out above, substantially this, —

First. That crimes committed by an American in a foreign country were not justiciable in the United States, and must, therefore, go unpunished unless the accused be delivered to the country wherein the crime was committed for trial.

Second. Such was not the case with Italy, since under the laws of Italy, crimes committed by its subjects in foreign lands were justiciable in Italy.

Third. That as a consequence of the difference in the municipal law, "it was logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation."

This adherence to a view of the obligation of the treaty as not requiring one country to surrender its nationals while it did the other, presented a situation in which the United States might do either of two things, namely: abandon its own interpretation of the word "persons" as including citizens, or adhere to its own interpretation and surrender the appellant, although the obligation had, as to nationals, ceased to be reciprocal. The United States could not yield its own interpretation of the treaty, since that would have had the most serious consequence on five other treaties in which the word "persons" had been used in its ordinary meaning, as including *all persons*, and, therefore, not exempting citizens. If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. 1 Kent's Comm., p. 175.

Upon this subject Vattel, page *452, says:

When the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; for a contract which contains reciprocal engagements, cannot be binding on him with respect to the party who on his side pays no regard to the same contract. But, if he chooses not to come to a rupture, the treaty remains valid and obligatory.

Grotius says (book 3, ch. 20, par. 38):

It is honourable, and laudable to maintain a peace even after it has been violated by the other party: as Scipio did, after the many treacherous acts of the Carthaginians. For no one can release himself from an obligation by acting contrary to his engagements. And though it may be further said that the peace is broken by such an act, yet the breach ought to be taken in favour of the innocent party, if he thinks proper to avail himself of it.

In 5th Moore International Law Digest, page 566, it is said:

A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do.

In the case of *In re Thomas*, 12 Blatch. 370, Mr. Justice Blatchford (then District Judge) said:

Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture.

In the case of *Terlinden v. Ames*, 184 U. S. 270, 287, the question was presented whether a treaty was a legal obligation if the state with whom it was made was without power to carry out its obligation. This court quoted with approval the language of Justice Blatchford, set out above, and said:

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question, whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance.

That the political branch of the government recognizes the treaty obligation as still existing is evidenced by its action in this case. In the memorandum giving the reasons of the Department of State for determining to surrender the appellant, after stating the difference between the two governments as to the interpretation of this clause of the treaty, Mr. Secretary Knox said:

The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy, notwithstanding the interpretation placed upon the treaty by Italy with reference to Italian subjects. In this connection it should be observed that the United States, although as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty or taken any step looking

thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect and has answered the obligations imposed thereby and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

The question would, therefore, appear to reduce itself to one of interpretation of the meaning of the treaty, the Government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it can not surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased that the word "persons" includes citizens. We are, therefore, committed to that interpretation. The fact that we have for reasons already given ceased generally to make requisition upon the Government of Italy for the surrender of Italian subjects under the treaty, would not require of necessity that we should, as a matter of logic or law, regard ourselves as free from the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy, even though Italy should not, by reason of the provisions of her municipal law be able to surrender its citizens to us.

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

Judgment affirmed.

DECISION RENDERED BY THE IMPERIAL ROYAL ADMINISTRATIVE COURT OF
AUSTRIA, INVOLVING THE QUESTION OF TERRITORIAL RIGHTS OVER A
RIVER FLOWING INTO A LOWER-LYING STATE.¹

Pursuant to a public hearing, held on January 11, 1913, at which the reporter of the decision hereinafter mentioned presented his side of the case, and the counsel for the plaintiffs theirs, the Imperial Royal Administrative Court, in relation to the complaints offered by the Vice-Governor of the Sopron District, in the name of the said district and the municipalities of Lajtaszentmiklós, Lajtaufjalu, Vimpác and Laj-tapordány, and of [follow the names of the plaintiffs: Private persons

¹ Communicated by Dr. E. Bousek, advocate at Wiener-Neustadt.

and industrial associations], rules against the decision of the Imperial Royal Ministry of Agriculture, dated April 6, 1912, Z. 15, 235, regarding the feeding of the Wiener-Neustadt ship canal, and holds that on the ground that some of the exceptions are not well taken and the remainder unfounded, the exceptions should be and hereby are dismissed.

Decision.

The Austro-Belgian Railroad Company of Vienna, the Leitha-Fischa Water-Works Company of Wiener-Neustadt and the following members thereof, to wit, the municipality of Wiener-Neustadt, as owner of the mill situated at Wiener-Neustadt, and formerly the property of Anna Kastner; Anna Saak, owner of the paper mill at Wiener-Neustadt; the Austrian Daimler Motor Company at Wiener-Neustadt; Heinrich Polsterer, mill owner at Wiener-Neustadt; the Wiener-Neustadt paper factory of E. and H. Salzer at Wiener-Neustadt; G. Roth, ammunition branch establishment near Wiener-Neustadt; Hans Hofer, mill owner at Lichtenwörth; M. Hainisch, Nadelburg Imperial-Royal private iron-safe and hardware factory at Lichtenwörth; Johann Hernych & Son, Nadelburg cotton mill, bleaching and dyeing works, near Lichtenwörth; Seutter & Co., spinning mill at Unter-Eggendorf; the Salzer and Hetzer Upper and Lower Eggendorf paper factory at Ober-Eggendorf; the municipality of Baden; Schöller & Co., Ebenfurth Imperial Royal private steam mill at Vienna; the Pottendorf Imperial Royal private cotton factory and twist mill at Pottendorf; the joint stock company of the Pitten Imperial Royal private paper mill at Vienna; Rohrböck Sons, hardware factory at Hof, in the Leitha district; Hutter and Schrantz, joint stock company at Vienna; the Boschan & Co., Weigelsdorf power-loom weaving mill at Weigelsdorf; Anton Polsterer, mill owner at Götzendorf, and the Count Harrach Board of Domains at Prugg on the Leitha, have, by spontaneous action, petitioned the Waterways Administrative Board of the District of Wiener-Neustadt for authorization to execute a project aiming to deflect water from the Leitha into the Kehrbach in order to facilitate the feeding of the Wiener-Neustadt ship canal; to take advantage of the fall of the water thereby created and to construct a hydraulic plant for generating electric power; to build bath-houses on the outskirts of Wiener-Neustadt, and, whenever necessary, to deflect water from the Leitha into the Fischa and into the Trautmannsdorf factory canal to compensate for the temporary diminution of driving water in the latter mentioned water-courses.

Based upon the conclusions reached by a commission, appointed in accordance with paragraph 78 of the Lower Austrian law relative to water rights of August 28, 1870, L.-G.-Bl. No. 50, and whose labors were prosecuted on March 15 and 16, June 24 and July 13, 1907, and from November 30 to December 4, 1908, the authorization requested by the petitioners was granted to them on December 19, 1908, according to the original document in reference thereto on file in the office of the administration of the District of Wiener-Neustadt. After having considered certain complaints entered against the said decision, the Imperial Royal authorities of Lower Austria by decision of September 29, 1909, confirmed the authorization, with changes in favor of the grantees made in paragraphs 17 and 22.

In view of the complaints entered against the said decision by the parties interested, the following changes were made in the contents of the concession:

I. In virtue of the changes introduced into paragraphs A, 15 and 16 of the concession granted in the first instance, the concessionaires were obligated — if in the improbable event that in consequence of the construction and operation of the projected power plant, the water supply should run short in any one of the Hungarian districts and localities referred to — to take adequate remedial measures to maintain a proper water supply, by resorting either to the local water sources of the said districts and localities, or to other agencies. Accordingly, the concessionaires were directed to apply, within a period not exceeding six months, to the competent authority and ascertain officially the actual conditions of the water supply in the respective districts and localities.

II. The district authorities of Wiener-Neustadt were directed to supplement the text of the concession with an exact description of the entire canal course, as far as Sollenau, including the outlet-lock of the canal at the Fischa ferry and the Sollenau chamber-lock, and the essential data bearing on the discharge capacity and all necessary drawings in regard thereto; to state the proper directions for the service of these structures, and, in case such directions should not exist, to establish a set of such directions by special proceedings according to the rules governing waterways.

III. It was ordered, furthermore, if the intersection-lock and that part of the canal between the latter and the new feeding station should be maintained, to extend the said description so as to include these

parts, and in such case, to determine, according to the service regulations, under what conditions the use of the said intersection-lock might be authorized.

IV. The petitioners were required to construct at Wimpassing a connecting canal in order to deflect the requisite amount of water from the Pottendorf factory canal, to maintain the usual water supply of the Leitha, and to submit the plans thereof to the competent board of commissioners for their action in accordance with the rules governing waterways.

V. The contractors were required to make such further provision for the indemnification of all possible and just complaints, as, for public reasons, the Waterways Board might deem necessary.

In all other respects, the decision rendered in the first instance was confirmed.

The following official authorities, districts and private individuals, who, as opponents, participated directly in the proceedings regarding the use of water, have entered and still maintain complaints against the said decisions.

I. The Vice-Governor of the Sopron (Oedenburg) District, in the name of the said district, and by their subsequent action in the name of the municipalities of Lajtапордány (Hungarian — Brodersdorf), Vimpác (Wimpassing), Lajtaujfalu (Neufeld), Lajtaszentmiklós (Neudörfl).

II. Paul and Ludwig Wittgenstein, and Gustav Figdor as owner of the mill near Wimpassing, and

III. The joint stock company of the first Hungarian jute factory and weaving mill at Lajtaujfalu,

IV. The grantees,

V. Some of the grantees, forming the Imperial Royal private joint stock company of the Pitten paper mill. —

In the matter of these complaints, the Administrative Court has considered the following:

I-III. In examining the validity of the complaints entered by the interested Hungarian parties — an examination which the court had to make not only because these complaints were opposed by interested Austrian parties, but because it was its official duty — the uncontested fact, expressly stated in paragraph 2 of the reasons assigned for the decision rendered in the first instance, must be borne in mind, that is, that the authorization directly granted by the Austrian Waterways

Administrative Board applies exclusively to Austrian territory and to Austrian waters, and therefore, in so far as the Leitha enters into the decision, to that part of the said river where both of its banks are within Austrian territory. Accordingly, the interested Hungarian parties, on account of certain measures taken and affecting the Austrian part of the Leitha and the Kehrbach which flows through Austrian territory, demand redress for injuries they claim to have suffered in their ostensible usufructuary rights in the Leitha in so far as the latter passes through Hungarian territory, and for injuries resulting from the fact that the level of the water-course running in the direction of Hungary has fallen in consequence of measures put into operation on Austrian territory. Nor do they rest their claims solely upon provisions of the Hungarian laws; on the contrary, they assert that, as interested persons juridically recognized, they are protected in their rights and interests by the Austrian regulations relative to waterways, namely, by the Imperial law of May 30, 1869, R.-G.-Bl. No. 93, and by the provincial law of Lower Austria of August 28, 1870, L.-G.-Bl. No. 56, concerning water rights.

The Vice-Governor of the Sopron District and the four Hungarian municipalities offer the special argument, that section 19 of the Lower Austrian law governing water rights, which guarantees the municipalities against injury to their water supply, extends also to the municipalities of a foreign state, which might suffer prejudice, as the result of regulations enacted by the Austrian authorities with reference to a body of water flowing beyond the Austrian frontier, even in case the regulations applied only to a body of water within Austrian territory. The owners of the Wimpassing mill and the joint stock company of the first jute factory and weaving mill at Lajtaujfalu rest their claims, on the one hand, upon a similar application of the provisions of section 14 of the Imperial law governing water rights, and on the other hand, upon the Lower Austrian water law, and, furthermore, upon an international customary law invoked by them, according to which all states are bound, in enacting measures applying to water-courses running beyond their respective frontiers, to respect the existing rights and juridically protected interests in these water-courses beyond their frontiers.

In reference to the latter point, it must be borne in mind that *states* alone form the subject of international law and of the rights founded thereon (*cf.*, among others, Ullmann, *Völkerrecht*, 1898, p. 40, last paragraph; Heilborn, *Das System des Völkerrechtes*, 1897, p. 82), and that

the nationals of the various states are considered as only the object of the international protection of their native country, upon which devolves the political duty to protect their interests abroad. Therefore, even in case of the admitted existence of an international customary law, in a dispute concerning an alleged injury, as in the present case set forth by the plaintiffs, the state alone could be regarded as a party thereto, and not those persons who are injured by the violation of an international right of the state to which they belong. In case of an actual international dispute between the two states, the Administrative Court, which is a national Austrian court and not an international arbitration court, would not be competent to pass judgment.

It must, furthermore, be borne in mind that, on the one hand, up to the present time, in so far as concerns the juridical conditions of water-courses flowing beyond the frontiers, we have not passed beyond the postulate of the mutual and fair consideration of the contiguous states through which the river takes its course; and, on the other hand, as is shown, among other writers, by Christian Meurer, in Vol. IV of *Zeitschrift für Politik* (1911), page 370 and following, opinions still widely differ regarding the extent to and the form in which this consideration should be applied. The thorough treatment which Dr. Max Huber, professor in the University of Zürich, gave to these matters at the First International Aqui-Economic Conference, held at Berne in 1912 (*cf.* the protocol, p. 27 and following), shows that even the conventional settlement of questions arising in connection with rivers passing beyond the frontiers presents extraordinary difficulties in justly protecting the interests of the contracting states. If then, the question of adjusting these interests, in so far as they involve international law, is far from having been finally settled, we must dismiss as erroneous the assertion that the Austrian water law, as incorporated in the Imperial water law of 1869 and in the state water laws of 1870, has automatically introduced an international water law similar to the principle of international private law, according to which usufructuaries and other interested parties may claim rights in existing usufructuary conditions in that part of a body of water passing beyond the Austrian frontier and outside of Austria, when the possibility of damage to the usufruct in that part of the body of water outside of Austria is feared in consequence of measures enacted within Austrian territory. The fundamental provisions of the Austrian water law do not afford the slightest authority in support of this assertion. Quite the opposite conclusion is reached from

an examination of section 10 of the Imperial water law, which declares that the rights even of the owner of a private water-course are restricted by reason of the rights of other persons entitled to the use of the water. The same conclusion is reached also by reason of public considerations resulting from the fluidity and indispensability of the water, as well as from section 89 of the Lower Austrian water law, which directs the Waterways Administrative Board, in case of disputed claims concerning water rights subject to its jurisdiction, to define absolutely the reciprocal rights of the parties in dispute, so that only possessors of rights and those having interests in such water-courses may, as qualified parties, appear before the Austrian Waterways Administrative Board. With regard to these parties the competence of the Austrian authorities is defined as follows: it is not only within the sphere of their duties to protect the rights acquired in such water courses, but they must see to it that, to safe-guard these rights, existing duties resulting from them, whether owed to other parties invested with rights or to the public, are observed. Their competence in the latter case is, however, confined to such waterways as are within the territory of the Austrian state, and does not extend to usufructuary rights in foreign waterways, that is to say, in waterways within a territory not subject to the sovereignty of the Austrian state. If the view taken by the interested Hungarian parties were to be accepted, we would be led to the untenable conclusion that the Austrian Waterways Administrative Board would have to protect usufructuary rights in foreign waters, in consequence of measures enacted within Austrian territory, when guarantees for similar protection of Austrian interests on the part of the foreign state would be totally lacking. For this reason, the political and economic interests referred to in section 89 of the Lower Austrian water law as criteria for weighing the import of opposing claims concerning water rights, are to be understood to mean the interests of the Austrian state only, which the Austrian administrative officers, by reason of their official oath, are bound to protect. In connection with these considerations pertaining to the water laws, we must, furthermore, emphasize the fact that the Austrian water laws contain no provision for summoning usufructuaries of foreign waterways involved in an Austrian law suit concerning water rights for the protection of which in foreign territory the Austrian authorities lack jurisdiction. Furthermore, there exists no binding, officially decreed political treaty based upon the Imperial law and upon the state laws concerning water rights, and no autonomous

or conventional law on which the interested Hungarian parties might base the position assumed by them.

For these reasons, the interested Hungarian parties base their contention upon section 2 of Article VIII of the treaty concerning customs and commerce existing between the two states of the monarchy and ratified by the law of December 30, 1907, R.-G.-Bl. No. 278; but by the provisions of this treaty the rights, not of private individuals, but of the two contracting parties, that is to say, the two *states*, are expressly stated, in absolute contradiction to section 2 of Article XV of this treaty, which confers upon the merchants and manufacturers of each of the two states the direct right to engage in industrial pursuits in the territory of the other state.

All these considerations lead to the conclusion, that under the present juridical conditions, possessors of usufructs in non-Austrian waterways are not entitled, in matters relating to Austrian waters, either as claimants, or as interested parties juridically invested with the right to party-hearing, to enter a plea against defective procedure and lack of jurisdiction; that, on the contrary, we may justly speak of competence on the part of the Austrian authorities, in so far as they are empowered to grant water rights at discretion, provided that, in the exercise of this power, which according to section 3, paragraph (e) of the law regarding the Administrative Court is not subject to revision by the Administrative Court, they seek to cultivate neighborly relations with third states and to secure likewise the good will of the foreign political authorities; and provided that, for reasons of international administrative policy, they bear in mind, in enacting provisions within Austrian territory, the protection of existing rights in foreign waters. Therefore, when for this purpose, they summon for the discussion of measures regarding water rights to be enforced by them in Austrian territory and according to Austrian laws, those entitled to the usufruct and others interested in a foreign water course, they do not thereby grant them rights not legally provided for, but merely secure from those invited, as *persons able to give information*, the necessary enlightenment for the exercise of their discretion. The status of these interested parties corresponds exactly to the status of persons testifying in inquiries held by administrative authorities or by parliamentary committees. They are entitled to the consideration of the Waterways Administrative Board by reason of international administrative policies, but even in these circumstances they have not the right to institute an action in a court of law. Nor do

complaints of such persons, when received for consideration by the Austrian authorities, become complaints of duly qualified persons which could not be declined for want of competence. On the contrary, such acceptance amounts to nothing more than information received by the authorities in their independent capacity or to an appeal granted, action upon which is, however, left to the discretion of the higher authorities.

For all these reasons, the complaints of the interested Hungarian parties, in so far as they are directed against the competence of the Austrian authorities for measures enacted by the latter with regard to Austrian territory, against the legality of proceedings carried out by the said authorities, against the sufficiency of consideration shown by them, and against the adequacy of protection regarding the regulations made in behalf of the interested Hungarian parties, must be dismissed, on the ground that the interested parties are not even entitled to the right of an administrative procedure. In consequence, the Administrative Court has only to consider, firstly, the exceptions taken by the owners of the Wimpassing mill for violation of the jurisdiction belonging to the Hungarian authorities over their water rights derived from Hungarian laws and to which rights they are entitled in *Hungary*; and, secondly, for denial of justice on the part of the Austrian authorities in a supposed valid contractual claim for indemnity against the Austro-Belgian Railroad Company.

Concerning the first of the aforesaid exceptions, the assertion that the Austrian authorities have decreed authoritative measures and intended to be carried out in Hungary, either with regard to the removal of a part of the canal in Hungary or with regard to the construction of new additions to the canal in Hungarian territory, is decidedly in contradiction to the documents themselves. Rather, in all cases where in their judgment it seemed necessary to adopt measures for execution in Hungarian territory, they merely required of the grantees that, for that purpose, they should secure the necessary authorization from the Hungarian authorities, and, therefore, raised the obtaining of this authorization into a condition of the concession. The territorial sovereignty of the Hungarian state and the legitimate executory competence of the Hungarian authorities seem, therefore, to have been protected.

It is also contrary to the documents of the case, to assert, according to the arguments advanced by the complaining mill owners, that the Austrian authorities have erroneously declared as expired the concession granted by the Hungarian authorities for the extension of the

water rights to which they are entitled in Hungarian territory. On the contrary, the district authorities of Wiener-Neustadt, with the approval of the Superior Waterways Administrative Board have expressed themselves to the effect that they could not regard the said extension in favor of the mill owners as coming within the sphere of their equitable deliberations, since, according to Austrian law, this extension of the concession should never have been approved: and, even in case the extension could have been considered valid, it should not in view of the mill owners' inactivity for a period of eighteen years have been further extended. This decision merely amounts to the ignoring of the extension of this concession for the district where Austrian laws prevail, and is not an annulment of the present constitutive enactment of the Hungarian authorities.

And finally, as to the complaints of the mill owners that no decision has been rendered on the claims for damages presented by them in accordance with the treaty of July 2, 1802, it may be said that, according to the declarations of the complaining mill owners, the question involves a treaty concluded between the interested Hungarian parties and the legal predecessors relating to the property of the ship canal, by which treaty compensation for damages had been assured to the interested parties in case of a decrease in the water supply in consequence of the supplying of water to the canal. These declarations lack all connection with the treaty that might warrant instituting proceedings regarding water rights before an Austrian authority. According to the declarations of the plaintiffs themselves, we are dealing neither with a case under section 68 of the Lower-Austrian law regarding water rights, namely, a case of reciprocal summons for judicial inquiry when water rights are infringed, nor with the case referred to in section 83 of the same law when, through action of the Waterways Administrative Board, there is a restriction or withdrawal of a subjective right founded upon the Austrian water laws in consequence of which an Austrian authority is entitled to compensation. In both of these cases the Waterways Administrative Board would be competent to proceed finally, or at least provisionally to the determination of the obligation to indemnify on the part of the violator. For lack of title to water rights, founded upon Austrian law, the ordinary courts only would, therefore, be competent to decide regarding the claim advanced by the plaintiffs. The mill owners have not, however, entered complaint against the omission to refer the claim to the proper course of law.

Regarding IV and V. As to the claims of the joint stock company of the Pitten paper mill concerning their factory at Wampersdorf, the concessionaires jointly and the said company separately appear as plaintiffs. The legal status between the concessionaires considered collectively, and that of the joint stock company of the Pitten paper mill differs to the extent that the former demands only annulment of that part of the disputed decision relating to the construction of a connecting canal at Wimpassing, while the joint stock company of the Pitten paper mill demands cancellation of the whole concession in case the said part of the disputed decision should be interpreted to the prejudice of their hitherto existing rights to the supply of water. The complaints of the two plaintiffs are, however, essentially the same and as follows:

1. It is asserted that the change made in Article 17 of the concession granted by the district authorities, according to which an amount of water equal to that conveyed through the new transfer channel from the Leitha into the Fischa must be returned into the Leitha at Wimpassing, for which purpose the channels in question must, according to the provision of the disputed decision to the effect that the petitioners shall build a connecting channel for supplying from the Pottendorf factory canal at Wimpassing the necessary amount of water to maintain the usual supply in the river Leitha, be kept in proper water-tight condition was granted to the detriment of the Wampersdorf paper mill upon the request of the Vice-Governor of the Ödenburg District and of the owners of a hydraulic plant situated in Hungary, and that these owners, according to the Lower Austrian law governing water rights, lose the right to appear as interested parties in proceedings which are to take place in Lower Austria concerning water usufructs existing and enforceable in Hungary.

2. That by the change made in the concession in the last instance, legitimately acquired water rights of the joint stock company of the Pitten paper mill are prejudiced.

3. That, at all events, this change rests on a faulty procedure, in so far as it had not been determined what effect the said change might have upon the rights of the owners of the Wampersdorf paper mill of the Pitten joint stock company, and in so far as, moreover, according to the text of the decision, it was not clear whether the quantity of water affected by this change should be returned into the Leitha before or after it had run through the upper and lower canal of the Wampers-

dorf factory. And finally, that the disputed redintegration rests on the erroneous idea, not in accord with the documents, that when they referred in their discussions to the amount of water taken from the Leitha and conveyed into the Fischa through the new transfer channel and which amount was to be returned undiminished into the Leitha at Wampersdorf-Wimpassing, the projectors and the two lower jurisdictions had understood by the expression "transfer channel" something distinct from the entire projected structure, as it had been projected and approved, hence, a special connection between the Pottendorf canal and the Leitha at Wimpassing.

In continuation of these expositions, it is also pleaded that the necessity of the connecting channel has not been sufficiently established.

The court has been guided by the following considerations:

Regarding I. Considering that the Austrian water authorities must so act that through the exercise of neighborly consideration they may insure to the possessors of usufructs in the water courses of a foreign state the good will of the authorities of the latter state in matters concerning domestic interests in water rights, they must, as has been stated already, be regarded competent, *as far as, according to the water laws, their administrative discretion extends and is not obstructed by legal claims, to take international considerations of this character into account.* The result of such action, as already stated, is not subject, according to section 3, paragraph e, of the law of October 22, 1875, R.-G.-Bl. No. 36 *ex 1876*, to revision by the Administrative Court, as long as the action is kept within the limits of the legal rules and, therefore, does not infringe upon subjective water rights founded on Austrian law. This provision has not been violated. The contrary assertions of the plaintiffs are disproved by the following reasoning.

Regarding II. The disputed decision contains an expression, entirely in accord with the documents, to the effect that, in virtue of the non-disputed and therefore valid provision of Article 17 of the concession granted by the district authorities of Wiener-Neustadt, an amount of water equal to that taken from the Leitha and conveyed through a "transfer channel" into the Fischa must be returned into the Leitha at Wimpassing. Nor does the disputed decision lack in clearness when stating that it considers the provision of the concession concerning the water-tight condition of the existing channels at Wimpassing as insufficient for that purpose and a connecting channel from the Potten-dorf canal at Wimpassing as necessary.

Support of the assumption that the said ministry had in this respect been guided by a misconception of the expression "water channel" used by the parties and by the lower jurisdictions is not disclosed in the decision. Regarding the building of this connecting channel, the disputed decision does not lay down any of the customary provisional directions, but confines itself to stating that the project in question and the rules necessary for its operation must be attended to according to the service rules, by the competent authorities in charge of water rights. Since the disputed decision is, however, directed to the end that the previously prevailing conditions regarding the uses of water as they exist at Wimpassing in favor of the Wimpassing mill and of the joint stock company of the Pitten paper mill at Wampersdorf, should be kept unchanged, and, since, at the public hearing the two government representatives approved this interpretation by stating that it had been the constant intention of the government to preserve the *statu quo*, it will be the duty of the competent authority to grant a full hearing, for the discussion of the projected canal of the joint stock company of the Pitten paper mill for the determination of its present usufructuary rights, for the adoption of resolutions to protect its present right to a supply of water, and to take the necessary steps for the building of and to adopt the administrative rules for the connecting canal. Since then, this meaning is to be given to the disputed decision, that is, the meaning with which the representative of the paper mill declared himself satisfied at the public hearing, the complaint of the concessionaires and of the joint stock company of the Pitten paper mill is hereby settled by the unanimous agreement of all concerned. In so far as the plaintiffs finally aver that the necessity of the proposed connecting channel for compliance with the regulations enacted regarding the water rights of the Wimpassing mill had not been established by a special procedure, this point of the disputed decision bears only upon an estimation, resting upon *technical grounds*, of the results reached by the lower jurisdictions and reached by a faultless procedure on the part of the said ministry, assisted by professional experts, from the revision of which, according to paragraphs 3, section e, and 6 of the law relative to the Superior Administrative Court, the court is excluded.

BOOK REVIEWS

Internationales Verwaltungsrecht. By Dr. Karl Neumeyer. Vol. I.
Munich and Berlin: J. Schweitzer, 1910. pp. viii, 560.

In his volume on international administrative law, Professor Neumeyer occupies a field hitherto uncultivated. By analogy to the principles of international private law, he endeavors to deduce from national legislation and practice a number of general rules as to the boundaries of national administrative competence, and as to the extent to which foreign administrative rules will be respected by a national administration. International administrative law as developed in this work has, therefore, nothing to do with the administration of general international interests, such as are organized in the public international unions. It is not the administration of the common activities and interests of the civilized world. The use of the word *international* in German is confined to relations of mutuality between nations. It does not include those elements which we comprise under the same term. Our "international law" is *Völkerrecht*; when used in phrases like "international private law" and "international administrative law," the term does not presuppose a general system, but certain relations between individual national systems. Professor Neumeyer desires to show how far the administrative activities of an independent nation are limited and affected by the fact that states, as members of an international community, are all of equal competence; and that in a case of conflict, reasonable and just principles have to be applied, in an effort to guarantee to each state the faculties essential to its independence. The first and principal problem is to determine the local limitations attending the exercise of administrative powers. The volume before us deals with matters of interior administration, such as personal status, sanitation and police, associations, education, the protection of children, and matters of religious and confessional administration. Thus, for example, the author considers the question as to how far the rules of obligatory education apply to resident aliens, and to what extent sanitary measures may be enforced against transients. The competence of administrative authorities with respect to associations having their seat

in a foreign country is discussed in great detail. The chapter on the press examines the problem as to how far the application of administrative regulations is controlled by the place of publication, or the place of sale of a book or newspaper. The effect of academic degrees, of orders, and of certificates admitting to the practice of professions, is another subject dealt with.

The author notes an important distinction between international administrative and international private law. Where a conflict arises in the field of private law, there is a distinct alternative between the obligation of the local national law and that of another state. One or the other will be applied. In public law, however, the question is usually exhausted when the competence of the respective administration has been determined: the application of the public law of a foreign state is not necessarily involved; as a matter of fact, it is usually left to the discretion of the latter state whether it will occupy the field left vacant. The method of international co-operation and mutual assistance will, therefore, take on a different form from that given it in the rules on the conflicts of private law. Thus, the national state, while not applying foreign administrative law itself, may agree to permit its application, for instance, through the activities of consuls or of a secret police; or it may directly assist the foreign state, through furnishing necessary information or "lending" its administrative machinery. All such relations of mutual helpfulness are only just beginning to be made the subject of international obligation. On the other hand, foreign administrative or public law will often determine the conditions upon which a local national administration has to act. Questions as to the validity of foreign marriages, the acquisition of foreign nationality, and admission to the practice of learned professions, are examples in point. Both in presenting an interesting problem in public administration, and in furnishing a rich material of law and precedent to illustrate the practice of nations in these matters, the author has performed a very important service to the science of public law as affected by international relations. Quite naturally, the illustrations are taken almost entirely from European practice. The supposition that the list of questions put to immigrants is, in the United States, also submitted to incoming diplomats, is fortunately a misconception, resting on the one incident when the inquisitorial sheet was placed before the Brazilian Ambassador, through the stupidity of a petty official.

PAUL S. REINSCH.

Lord Durham's Report on the Affairs of British North America. Edited, with an introduction, by Sir C. P. Lucas. Oxford: Clarendon Press, 1912. 3 vols. pp. 335, 339, 380.

This new edition of Lord Durham's Report, edited by the recent head of the Dominions Department of the British Colonial Office, attests the dignity to which the Report has attained as a constitutional document of the British Empire. The editor writes an "Introduction," which occupies the whole of the first volume; the second volume gives the text of the Report; and the third contains some of the special reports and related documents, closing with Charles Buller's account of the mission. It is a matter of common knowledge that Lord Durham, when in Canada in the summer of 1838, as Governor-General and High Commissioner to settle and pacify the country after the rebellion of 1837, became convinced that all Canada ought to be united, and that in his Report he recommended that United Canada be placed under what is now called "responsible government." It is not, however, always realized what tremendous consequences were involved in the position taken by him. He proposed the placing of the government of the colony in the hands of the people of the colony and this, as he well understood, meant virtually the recognition of the statehood of the colony, and the establishment between it and the mother country of a voluntary and federal relationship.

Sir Charles Lucas very properly gives Lord Durham the credit for recommending the policy which now holds the British Empire together, while at the same time recognizing the great ability and devoted loyalty of his associates, particularly of Charles Buller. As Lord Durham had legally the sole power, he had also the sole responsibility, and it required not only wisdom but courage, in the face of the revolutionary spirit of the Canadians, separated as they then were by racial and religious differences, and ruled by special interests habituated to corruption of government, to recommend and advocate the union of the Canadian provinces, and the virtual independence of the united dominion under a responsible government like that prevailing in England. It was, in fact, to substitute for the system of empire by Great Britain, as respects the colonies of European origin, a system of federally united states, with Great Britain as the federal head.

That Lord Durham advocated the change of system only for the colonies where the British blood was paramount, or could be made

paramount by consolidation of provinces into a union, is evident from his much-quoted words explaining his motives (Vol. 1, p. 310):

Our first duty is to secure the well-being of our colonial countrymen; and if in the hidden decrees of that wisdom by which this world is ruled, it is written that these countries are not forever to remain portions of the Empire, we owe it to our honor to take care that when they separate from us, they shall not be the only countries on the American continent in which the Anglo-Saxon race shall be found unfit to govern itself.

Sir Charles Lucas, writing three-quarters of a century after Lord Durham, with an experience of many years as one of the active high officials in the government of the British Empire, recognizes that the principle laid down by Lord Durham is universal in the Empire. In his Introduction, he says, after quoting the above words of Lord Durham (Vol. 1, p. 316):

These words apply beyond Canada and beyond America. The spirit of them transcends the sphere of settlement, it is the living force of the whole British Empire. The words are the message of a great Englishman to his fellow-countrymen, that the one thing needful is to leave behind a legacy of what is permanently sound and great.

Lord Durham recognized that the principle laid down by him carried with it the duty on the part of the nation exercising supreme jurisdiction, of preparing a constitutional frame of government for the colony or dependency, which could immediately or gradually be adapted to self-government, of laying out municipal and administrative districts for purposes of local self-government, of providing for a regulated private ownership of land and goods without which civilized government is impossible, and of establishing a public system of education whereby all the population might be taught those elements of knowledge and skill which would enable them to be self-supporting and intelligent enough to participate in and supervise their own governments. To all these subjects he devoted himself during the five months which he spent in Canada, appointing special commissions of the best men he could find, whose reports largely furnished the basis of the subsequent political arrangements under which Canada has so wonderfully flourished. Sir Charles Lucas at the close of his Introduction dwells upon this appreciation by Lord Durham of the obligation of constructive action which rests upon any nation which accepts the general prin-

ciple of responsible government for its colonies and dependencies. He says (Vol. 1, p. 316):

It has been attempted in the foregoing pages to lay stress upon what has been termed Lord Durham's constructiveness. To all times and to all sorts and conditions of men he has preached the doctrine that for peoples, as for individuals, the one thing worth living for is to make, not to destroy; to build up, not to pull down; to unite small disjointed elements into a single whole; to reject absolutely and always the doctrine of *Divide et Impera*, because it is a sign of weakness, not of strength; to be strong and fear not; to speak unto the peoples of the world, that they go forward. In this constructiveness, which is embodied in all parts of the Report, he has beyond any other man illustrated in writing the genius of the English race, the element which in the British Empire is common alike to the sphere of settlement and to the sphere of rule. It is as a race of makers that the English will live to all time, and it is as a prophet of a race of makers that Lord Durham lives.

When we reflect upon the tragedy of Lord Durham's life, as, unsupported by his government, he returned to England from Canada with his feeble health shattered, to die in discouragement and apparent defeat, and when we remember to how large an extent the colonial policy of Great Britain (like the colonial policy of all other nations) has been directed to the improvement of the trade of the dominant nation, and how recent is the idea that a nation is responsible for the betterment of the individual in the colonies and dependencies and for promoting colonial self-government, we may hesitate to accept the estimate of the editor of the Report as to the past constructiveness of the rule of Great Britain in the Empire. But as an earnest of the future, the words of so close a student of British Imperial policy as Sir Charles Lucas are inspiring.

An interesting circumstance concerning Lord Durham's departure from Canada is related by Charles Buller in his *Account of Lord Durham's Mission*, written in 1840, which, together with his comment upon it, deserves quotation. He says (Vol. 3, p. 368):

He had originally proposed embarking at New York, after previously visiting Washington. The knowledge of this intention had created the greatest satisfaction in the United States, and the people had made preparations for giving him an enthusiastic welcome. Shortly after, in my passage through the States, I heard that the corporations of the various great cities on his line of way had made arrangements for meeting him at different points, and conveying him from one to the other. In fact he was everywhere to be received by the local authorities as a public visitor. On our return to England he was informed by Mr. Stevenson, the American Minister, that at Washington he was to have remained with the President at the White House as a national guest—an honor never before conferred on any one but Lafayette.

Such a deep impression had Lord Durham made on the people of the United States: nor has that impression been yet effaced: to the hour of his death his popularity in that great country remained undiminished. I regret that no visible exhibition of this popularity occurred in the manner proposed, both because it would have been a great support to Lord Durham at home, and because it would have been useful in teaching our public men in what way and with what ease mere honesty and courtesy can secure the good will of that great kindred nation.

The respect which the American people felt for Lord Durham in 1838 was continued and increased by the publication of his Report. The principles for which he stood were in fact the principles laid down in the Declaration of Independence. He, however, laid down these principles as of special application, whereas to the American mind they were universal. The American nation, when called upon in 1898 to assume the responsibility for the government of the Philippines, sent a commission to study the circumstances and needs of the country, as Great Britain had sent Lord Durham to Canada in 1838, and applied the same principles as he had recommended for Canada to the fullest extent possible, even though the Filipino has had no inheritance of the idea of self-government or any experience in the art. Thus Lord Durham's Report has a special interest for the people of the United States, though this nation, consistently with its fundamental principles, has applied the principles he laid down in a far wider sense than he intended.

That which Sir Charles Lucas in his Introduction calls the "constructiveness" of Lord Durham was, it would seem, better termed his recognition of the responsibility of Great Britain for the weaker countries which had come under its jurisdiction, control or influence. True it is, he recognized this responsibility only in a special case, and that, too, a case where he deemed that it was possible to perform the responsibility by turning over the internal government to the people of the colony; but even this was a new idea in his time, at least in the European world. National rights were then insisted upon, by all nations of the European system, without any regard for the self-evident truths that wherever there are rights there are corresponding duties, and that the greater the power the greater the responsibility. To these truths, as applied to nations dealing with their colonies, he called attention. Grotius, two centuries before, had insisted upon the truth that nations have duties as well as rights, as applied to the dealings of nations with each other. Lord Durham did pioneer work in colonial science like that which Grotius had done in international science. Both were en-

lightened humanitarians who brushed aside the sophistries and technicalities of their time and substituted justice for injustice. The work of both will live because they based themselves on principles which commend themselves to all right-thinking people and which are of universal application.

A. H. SNOW.

Il Diritto Aëreo. By Enrico Catellani. Turin: Bocea. 1911. pp. 237.

Professor Catellani has chosen the term "Aërial Law" as being most inclusive, embracing as well questions of wireless telegraphy as of aërial navigation. While, however, he deals with the general principles of national control over aërial regions, he confines his detailed treatment to questions relating to the navigation of the air. He examines the question of the territoriality of air, associating himself in principle with those who consider the air as *res omnium communis*. He examines the various theories on this matter, and rejects both Zitelmann's idea that sovereign control extends vertically through the air without limitation, and that of Holzendorff, who deals with the air space by analogy to the marginal sea and tries to fix a determinate height within which sovereign control may be exercised. Catellani believes in a condominium between the local sovereign and the general interest of civilized nations: "The rights of the territorial sovereign extend to the space above only in so far as is indispensable to the enjoyment and government of the property and territory beneath; but even within the orbit of this irradiation of national power, the right to dispose and control exists side by side with the right of collective regulation. These rights must be regarded as faculties mutually independent, but co-existing with respect to the same thing, and necessarily subject to co-ordination." It will be noted that this most interesting suggestion of a local national control, co-existent with an international right of use, finds a precedent and analogy in American federal law, where national and local jurisdiction co-exist within the same territorial units. The author more fully expresses his thought as follows: "When aërial navigation shall have become a normal means of communication, it will certainly be necessary to consider the entire area of the national territory as a frontier, especially with regard to the customs, police, and sanitary laws. But at the same time, beyond this customs frontier, every special sovereign right of the state ceases. Throughout the entire aërial space there will exist a condominium. From the point of view of innocent use and passage, the

entire aërial space interests, and is the common property of, the human race. There is no question of a limited liberty, or of certain rights reserved to the territory, or of a sovereignty limited by certain servitudes of passage, but there is a co-existence of the two rights, which in the orbit of their respective evolution extend, the one throughout the aërial space of the entire world, the other to the entire space belonging to the territory of an individual state." The working out of this interesting idea of the co-existence and co-ordination of two spheres of rights lends great interest to the chapters in which the legal phases of aërial navigation are discussed in detail.

PAUL S. REINSCH.

Le Régime International de la Propriété Industrielle. By A. Pillet. Paris: Larose et Forcel. 1911. pp. xi. 511.

M. Pillet gives a treatment of the law of industrial property as affected by the interaction of national legislation and international agreements. He is dominated by a desire to master the confusion rampant in this subject, and to reduce it to orderliness by bringing the many rules and ideas involved under the control of a few clear principles concerning the relations between national law and treaty obligation. In the introductory chapter, the author develops certain definite dominant ideas. Thus, he distinguishes between protection of acquired property, and of a patent monopoly. As every monopolistic privilege is *prima facie* against the public interest, the monopoly involved in a patent is to be distinguished from industrial property, such as a trade-mark or commercial name. The latter, even in the absence of a treaty, ought to be protected by the courts; whereas, the former, implying a derogation from general right, will be acknowledged only in accordance with strict legal or treaty obligations. While, in general, the principle of territoriality applies to the loss of industrial property, to the extent that a stranger may not exercise a right of this kind in any country under conditions different from those imposed upon the local citizens or subjects; yet the principle of territoriality is not exclusive, as a certain solidarity exists between the industrial property held by a person in various countries. Thus, for instance, the duration of a patent right would be ordinarily determined by the laws of the country where the patent was originally obtained. For this reason the principle of territoriality is not a sufficient guide in matters of patent law. There is, therefore, a capital difference between a foreigner who takes out his

first patent in France (*e. g.*), and a foreigner who seeks protection for a patent originating in another country. The rights of the former are governed entirely by French law, although he may have been admitted to the protection of that law by international agreement. The right of the second, however, is governed by the law of the foreign state where the patent originated, in all respects except where, for special reasons of public order, the local law will supersede the law of the state of origin.

The first part of M. Pillet's treatise is taken up with an account of the French law of industrial property; the second part with the International Union of Paris, its formation, and its effect upon national law. In connection with the latter, the author discusses the theory that the international convention guarantees a "minimum of protection." This expression he considers ill chosen; he does not believe that the founders of the Union desired to establish a common legislation. In fact, the idea of a common legislation seems to him to be impossible, considering the great differences among the various countries concerned. The theory of the minimum of protection would imply that the treaty would abrogate interior legislation, if the latter is less favorable than the rule introduced by the treaty; but the treaty itself would be abrogated by a law containing a greater amount of protection to industrial property than provided for in the treaty. No such direct connection between the minimum contained in the treaty and national legislation was in the mind of the makers of the treaty. The minimum is to be understood as internationally adopted, with the understanding that nations will make their legislation conform to it, and also that restricted unions may be formed, in which an even greater amount of protection will be provided for. To hold that the treaty would *ipso facto* supersede legislation in case the latter were less favorable would often create very difficult problems, as it would be next to impossible to determine, under certain conditions, as to what law was to be considered more favorable.

PAUL S. REINSCH.

Manuel de droit maritime. Ed. Vermond, Professeur à la faculté de droit de l'université d'Aix-Marseille. Paris: Larose & Tenin. 3d ed., 1911. pp. viii, 508.

This book is one of very limited scope and not a general treatise on maritime law. The *Manuel* gives attention more particularly to the modifications which the development of commerce has introduced in the civil code and in the commercial code. Considering maritime law

from two points of view, *viz.*, as relating to vessel and as relating to cargo, the aim is to present as exactly as possible the bearing of the principles of the law.

Ships having sufficient carrying capacity to engage in maritime commerce are regarded as under maritime law. The legal status of such vessels is considered. The juridical acts by which the personnel becomes related to the vessel and their relations under the law to one another and to the vessel are set forth.

The second part of the *Manuel*, which treats of the cargo and of the use of the vessel, covers the subjects ordinarily coming within admiralty jurisdiction, such as maritime contracts, general average, collisions, salvage, etc. This treatment shows that in some respects the French law has not kept pace with the development and changes in means of transportation on the sea.

While the *Manuel* is particularly and narrowly directed to French practice, many of the topics are considered in an historical and theoretical manner, which gives the book a value for the general reader.

GEORGE G. WILSON.

Die Frage der Minen im Seekrieg, Auf der Grundlage des Haager Abkommens "über die Legung unterseeischer selbsttätiger Kontaktminen" vom Jahre, 1907. Historisch und dogmatisch beleucht von Dr. jur. Erich Rocholl. Marburg a. L.: Adolf Ebel. 1911. viii, 154 p.

This brochure of 154 pages is one of the series of studies issued from the Seminar of Political and Legal Science of the University of Marburg. The early pages show briefly the rapid development of the use of mines in warfare on the sea and particularly the general use of mines in the Russo-Japanese war of 1904-1905. Then follows a review of the opinions of some of the writers in the French, English and German languages and a reference to the resolution of the Institute of International Law. About thirty pages are given to a tabular view of the propositions made at the Second Hague Conference in 1907. There is also a brief consideration of the discussions at the Conference. It is evident that the dangers to neutrals and to belligerents are so great that definite regulations should be adopted, and it is also evident that the rules of the Convention of 1907 are often vague and indefinite. The treatment of the subject as presented by Dr. Rocholl forms a convenient summary of the positions taken by certain of the delegates at The Hague in 1907 and of the opinions of some writers who have referred to the use of mines.

Certain proper names appear in forms differing from those in the official reports, as Röll for Röell; Tzudzuki for Tsudzuki; v. Marschall for Marschall von Bieberstein; Merey de Kapos Mere for Mérey de Kapos Mére; Giese von Gieslingen for Giesl. "Oldershay" is not a name well known to international law, though it might be possible to establish the identity of "The New York Gun."

This brochure is another testimony to the inadequacy of the Convention relative to the Laying of Automatic Contact Submarine Mines, though it must be acknowledged that the Second Hague Conference did a valuable service in reaching any agreement upon a subject so difficult.

GEORGE G. WILSON.

The Native States of India. By Sir William Lee-Warner. London: Macmillan & Co. 1910. pp. xxi, 425. \$3.25 net.

The change of title in this second edition of *The Protected Princes of India*, illustrates the progress of political thought since 1894, the date when the book was first published. The democratic and republican word "state" replaces the word "princes," and the word "native," which may denote either equality or superiority as well as inferiority, is substituted for the old word of subordination "protected." This change of the terms of description is of tremendous significance when it is realized that only little more than half of the territory of what is called the Indian Empire is subject to the plenary jurisdiction of Great Britain, and that little less than one-half is composed of nearly seven hundred native states, each under its own native ruler, over each of which Great Britain exercises a superintending power and the territory of which is in a sense foreign even to British India. As the author says (p. 14): "The Indian Empire includes 1,097,901 square miles of British territory with 232,072,832 British subjects, and if we accept the boundaries of India as traced by geographers, 824,283 square miles with a population of 68,210,660 are regarded by the law of India as foreign territory, inhabited by people who, in the absence of naturalization, are not treated in India as British subjects."

The striking feature in the development of the principles upon which this superintending power is exercised is the steady tendency towards the legal and constitutional limitation of the power until now the Government of India recognizes itself as having substantially the powers of a Federal Government with respect to the native states, with only such qualifications as are demanded by the local circumstances.

The author traces the development of British policy. From 1757 to 1813, he describes it as "the policy of the ring-fence." The object of the British Government, represented by the East India Company, during this period, was to avoid all intervention in the native states, leaving them to fight their own battles, in the hope that a large consolidated state might arise with which it would be possible to treat. This policy broke down for two reasons,—that the native states attempted to enter into negotiations with foreign Powers, thus endangering British rule in British India, and that treaties of alliance and commerce were entered into by the British Government in India with some of the native states which others of the native states refused to respect. Thus a second policy arose, which the author calls (p. 123) "the policy of subordinate isolation with military coöperation." This policy continued, under the East India Company, from 1813 until the Mutiny of 1857. This differed from the original policy in that the British Government of India took charge of the foreign relations of the native states, and protected and guaranteed the existence of each of them against the others in as nearly a condition of independence as possible, in return for the obligation of each to maintain an army to be used, when necessary, as a force subsidiary to the armed forces of the British Indian Government. As a part of this policy of subordinate isolation, the government adopted the practice of annexing the territory of native states to British India when their peoples were unable to agree upon a native prince to rule over them. After the Mutiny of 1857 and after the British Crown took over the franchises of the East India Company, the new régime began, which based itself on what the author calls the policy of "subordinate union." In lieu of annexation of native states when they fell into a state of anarchy, the British Indian Government assumed the responsibility of limited intervention for the purpose of restoring a stable government, for that purpose selecting the prince to reign in the state after a judicial investigation of the rights of those claiming the power. It also assumed the power over interstate commerce, postal and telegraphic communication, and roads, railways and canals, and the right of eminent domain and eminent jurisdiction of territory for the purpose of enabling it to carry these powers into effect. It also arranged for permanent British resident commissioners in each state and for extraterritorial rights of British-born subjects under the charge of the resident commissioners. In a word, this relation assumed by the British Indian Government to the native states which now exists, is

substantially that of a federal government, with some added powers of internal superintendence necessitated by the circumstances. It is interesting to notice that the author frequently cites the Constitution of the United States in his discussion of the various powers exercised by the British Indian Government in the native states and shows the resemblance and differences between the powers exercised in the one case and in the other — differences which are in main due to the necessities of the case in dealing with monarchical states, and with populations which do not admit of admixture between the various populations.

The author, however, is of the opinion that the relationship of the native states to the British Indian Government is not a constitutional one, though he is also of the opinion that they are not states in the strict international sense nor in the strict feudal sense (pp. 390-398). He expresses the relationship in terms partly feudal, partly constitutional and partly international; regarding them as semi-sovereign states, (p. 399) but as "dependent upon the British Government" (p. 405). He cites the words of the British Parliament in the Interpretation Act, 1889, p. 18, in which India is defined as "British India together with territories of any Native prince or chief under the suzerainty of Her Majesty, exercised through the Governor General of India or other officer subordinate to the Governor General of India," and acts of the Indian Legislature applying to subjects of His Majesty "within the dominions of provinces and states in India in alliance with Her Majesty." He quotes also the following language from the Report of the Privy Council in 1902 in the Matabeland case:

In India there are hundreds of states in which the East India Company, during its rule, and afterwards the Crown, has acquired large powers of administration * * * And yet, unless there has been cession of territory, the least independent of such states is for some important purposes a foreign state, its subjects are not British subjects, the laws passed by the Indian Legislature do not affect them, and it is subject to such rules as have been duly made in accordance with the jurisdiction acquired over it.

In such a case as that with which the author deals, where there is an undoubted protectorate, where the parties understand that the relationship is permanent, and where all the governments concerned are monarchical it seems necessary to apply, as the author does, a mixture of feudal, constitutional and international notions and terms, in order to describe the relationship.

A. H. SNOW.

PERIODICAL LITERATURE OF INTERNATIONAL LAW

[For abbreviations see Chronicle of International Events, p. 594]

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KATHRYN SELLERS.

JURISDICTION OF AMERICAN-BRITISH CLAIMS COMMISSION

Meaning of the phrase "principles of international law and of equity" as used in Article 7 of the Special Agreement between the United States and Great Britain of August 18, 1910, and of the phrase "admission of liability" in paragraph II of the Terms of Submission attached to the Special Agreement.

ARGUMENT DELIVERED BY J. REUBEN CLARK, JR., GENERAL COUNSEL FOR THE UNITED STATES IN THE AMERICAN-BRITISH CLAIMS ARBITRATION

This argument was delivered by Mr. Clark in connection with the defense made by the United States to the claim presented by His Britannic Majesty's Government for compensation for the losses sustained by William Hardman at Siboney, Cuba, during the Spanish-American War. The occasion for the making of the argument arose from the following circumstances:

During the course of the argument made by the Honorable E. L. Newcombe, Assistant Agent for Great Britain, in presenting the claim of the Canadian Government against the United States in what is known as the "Yukon Lumber" case, His Excellency, Henri Fromageot, President of the Tribunal, inquired as to the existence in American and English law of a certain principle of the French law. In the course of the brief discussion which followed on this point, Mr. Newcombe stated that in his judgment the provisions of French law were wholly inapplicable to the case under discussion which was to be decided entirely under and in accordance with the principles of American and English law.

During his argument presenting the Hardman case to the Tribunal, the Honorable C. J. B. Hurst, C. B., K. C., Agent for Great Britain, took the position that in its decision of the case, the Tribunal must be bound by the strict rules of international law. Thereupon, the President of the Tribunal referred to the provisions of Article 7 of the Special Agreement under which the Tribunal is organized and acts, and particularly to that provision of the article which speaks of "equity." The clause in question reads:

"Each member of the tribunal, upon assuming the function of his office, shall make and subscribe a solemn declaration in writing that he will carefully examine and impartially decide, in accordance with treaty rights and with the principles of international law and of equity, * * * *

Mr. Hurst, in discussing the question thus raised, contended in substance that the use of the word "and" instead of "or" connecting "international law" and

"equity" showed clearly that the intention was that equity should apply only in cases where international law did not cover the ground but that where international law did cover the ground, the Tribunal was to apply that law.

Mr. Clark's argument was made primarily for the purpose of setting forth the position of the United States with reference to the provisions of Article 7.

There had also arisen in connection with the argument in the case of the "Lindisfarne" presented by Great Britain, the question as to the meaning of the second clause of the Terms of Submission which provides:

"The arbitral tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim any admissions of liability by the Government against whom a claim is put forward."

It appeared from the argument presented by Mr. Hurst on behalf of Great Britain that His Britannic Majesty's Government was prepared to take the position that communications from a subordinate officer to the head of a department, between the different heads of different departments, from the head of a department to the President, as also communications from the President to Congress, might be invoked as admissions of liability on the part of this Government for the injury complained of, where such communications had come to the notice of His Britannic Majesty's Government. Moreover, the view was seemingly entertained by the British Agent that it was immaterial whether or not such communications had been brought officially to the attention of His Majesty's Government by the Department of State.

This offered the occasion for the presentation of the last half of Mr. Clark's argument.

Mr. CLARK. Mr. President and members of the Tribunal:

In this discussion not only of the general jurisdiction of the Tribunal but also of "admissions" and "equities," I am happy in this thought—that so far as I understand the comments made by the learned Agent of Great Britain on the points mentioned, we are, from what he has said today, in substantial accord. I am therefore led to hope there will be no great differences developed between us on the questions to be discussed.

I shall be as brief as possible, in order not unduly to weary the Tribunal, with a necessary regard, of course, to the discussion, in an appropriate measure, of the points upon which I desire to speak.

It seems to me, in the first place and laying the foundation for a consideration of the meaning of the principles of equity as stated in Article 7 of the Special Agreement, that it must be kept in mind that arbitrations may be of two kinds: that is to say, a nation may arbitrate questions of policy, either its international policy or its national policy, as to which it may become involved in matters of difference with other nations. Certainly two nations in disagreement over any matter are entitled to submit that question to arbitration if they so desire.

That is one kind of arbitration.

The other kind of arbitration is an arbitration of legal differences; that is, differences which arise between two governments on questions and matters of law.

As I have remarked, either kind of question is arbitrable; that is to say, two nations may agree to submit either to arbitration. Only the latter kind, however, I take it, is to be subject to the rules and principles of law, unless otherwise laid down in the terms of submission.

There has been considerable confusion in the use of the term "arbitration," and not infrequently even governments, in discussing the matter, have used the term, one government having in mind one concept of the meaning of the word and the other government another meaning, thus often leading to misunderstandings and disagreements otherwise entirely unnecessary.

It seems to me essential to understand, as affecting this Tribunal, the precise kind of an arbitration in which we are engaged; that is whether we are engaged in an arbitration in which questions of policy or questions outside of the domain of law are to be considered, whether we are engaged in an arbitration in which other considerations than legal considerations are to enter; or whether we are engaged in an arbitration of matters of law, before a judicial tribunal created by the parties, because they had otherwise no common court to which they could submit their claims or questions of legal difference.

As bearing upon this question in a general way, but not specifically (because the Special Agreement is not thereunder) I wish to refer you to the language of the general treaty of arbitration between the United States and Great Britain of 1908.

Article 1 says:

"Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred"—

and then follow provisions not pertinent to the present discussion.

Now, the essential element to be noted in this article is that the treaty relates to and governs differences which may arise of a legal nature, or relating to the interpretation of treaties. Those were the differences in

contemplation of the parties when they made this general treaty of arbitration.

Article 2 of this same treaty provides:

"In each individual case the high contracting parties, before appealing to the Permanent Court of Arbitration, shall conclude a special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure."

The point that I wish to get from this article is that there is to be under this treaty a special agreement, a *compromis*, defining the scope of the powers of the arbitrators.

It is unnecessary for me to observe that there is in the present proceeding such a special agreement as this convention calls for. Taking up that Special Agreement and turning to its preamble, the following provision is found:

"Whereas Great Britain and the United States are signatories of the convention of the 18th October, 1907, for the pacific settlement of international disputes, and are desirous that certain pecuniary claims outstanding between them should be referred to arbitration, as recommended by Article 38 of that convention,

"Now, therefore, it is agreed that such claims as are contained in the schedules drawn up as hereinafter provided shall be referred to arbitration, under Chapter 4 of the said convention, and subject to the following provisions."

Turning now to Part 4 of The Hague Convention for the Pacific Settlement of International Disputes, which is thus incorporated in this Special Agreement, it is to be noted that Article 37 (which is the first article under Part 4, Chapter 1) provides:

"International arbitration has for its object the settlement of disputes between states by judges of their own choice, and on the basis of respect for law."

I desire here to emphasize that the disputes are to be settled by *judges*. Article 38, which follows, says:

"In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle.

"Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should—"

and then follow stipulations not presently pertinent.

In other words, Part 4 of the Pacific Settlement Convention itself, in positive terms, contemplates the settlement of legal differences and matters, as distinguished from non-legal controversies, and such settlement is to be made under and in accordance with that part of the convention dealing with the mode of such settlement.

The method of settling other difficulties—difficulties with reference to policy or difficulties with reference to acts that are beyond or outside the domain of law, are provided for in the earlier parts of that convention,—those parts dealing with good offices and mediation, and with international commissions of inquiry.

If, therefore, this is to be a decision by judges on the basis of respect for law, in accordance with the terms of the Hague Convention, I submit that this means the constitution of a court, a court of law, and as I shall explain a little later on, this establishment of a court, this appearance before a court, must be taken to mean that the Tribunal itself will administer law.

I wish at this point to draw a distinction between a tribunal sitting as a court to administer law, and a body sitting as a legislature to make law. The functions of the two bodies are wholly distinct, and should not be confused. This Tribunal sits as a court, not as a legislature. It is to administer, not make, law.

Turning, now, to Articles 51 and 52 of the Convention for the Pacific Settlement of International Disputes, it will be observed that provision is there made for the making in each particular case of a *compromis*. In these articles it is also provided—I shall not take the time of the Tribunal by reading them—that the *compromis* so to be made shall define the scope and the powers of the arbitrators.

Looking now, pursuant to these provisions, to the Special Agreement in order to determine the powers of the arbitrators on the point in question, it is to be observed that Article 7 provides:

"Each member of the tribunal, upon assuming the function of his office, shall make and subscribe a solemn declaration in writing that he will carefully examine and impartially decide"—

Note what follows—

"in accordance with treaty rights and with the principles of international law and of equity, all claims presented for decision, and such declaration shall be entered upon the record of the proceedings of the Tribunal."

Under this Special Agreement three things are to be looked to by the arbitrators, in their determination of cases coming before them: (1) treaty rights, (2) the principles of international law, and (3) the principles of equity.

I take it that there is no necessity for developing, at this time at least, any argument regarding treaty rights. That matter will hereafter come up for very full discussion in later cases, and treaty rights are not involved in the cases now before the court.

As to the principles of international law, as used in the Special Agreement, the matter stands differently. As the learned Agent for Great Britain pointed out this morning, until we began with the Hardman case we have had before the Tribunal no case presenting a question of international law. I may say that what is true of the two cases already presented,—the "Lindisfarne" and the "Yukon Lumber,"—will be true of any number of cases that will hereafter come before this Tribunal for consideration, determination, and award. This fact leads me to this suggestion, perfectly obvious I submit, that the domain of strict international law as thus far developed and recognized by the nations, fails wholly and absolutely to cover all of the activities and all of the intercourse in which nations under modern conditions are engaged. Therefore such international law fails to provide a remedy for many of the disputes which arise between nations on matters concerning questions purely of a legal nature, and arising out of their intercourse.

Looking at the matter from a slightly different angle: I think it must be conceded that in considering the growth and present development of international law, we begin with each nation of the family of nations as an absolute power in itself, an individual unit subject to no rules and to no regulations. However, as nations came together and formed a family, a society of nations, each nation gave up a certain amount of the autonomy, of the independence which, as a separate and distinct unit,

it had theretofore enjoyed. The sum of these national surrenders, if you will, constitutes the body of international law as we have it today. But the nations have reserved to themselves, and have declined to surrender one to another, perfect freedom in a great mass of activities, some of which are in process of delimitation and subjection to rules of action, though not yet sufficiently defined to be generally recognized as international law, while other activities still remain wholly beyond the reach of rule or restraint.

This Tribunal, to repeat what I said a moment ago, has already had presented to it two cases that do not fall within the domain of prescribed rules of international law. For that reason the learned arbitrators will not be able to go to the books of international law as was observed by my honored Colleague this morning, and find one word there which will be of assistance to them in the determination of the two cases presented yesterday and the day before.

The question then comes, where is the Tribunal to look, where is this Tribunal to go, for the law which it has to apply in cases involving purely questions of law, but as to which there is no applicable principle of strict international law?

It seems to me that the answer to this question is more or less obvious.

In the first place, I assume the Tribunal should apply in such a case the principles of private international law, so-called, in so far as they may be applicable—and there will be cases arise, I am confident, where the principles of private international law will be invoked by the one or the other party to this arbitration.

In the next place, the Tribunal will invoke in appropriate case the principles of maritime law, the principles which were involved in the case of the "Lindisfarne" already presented to you.

Again, where there is no international law, and where neither the principles of private international law nor the almost equally co-existing principles of maritime law apply, it seems to me that the Tribunal should look for their guidance to the fundamental principles of the jurisprudence of the various systems of laws, particularly the common law (and I include in that term the common law and equity as understood in the United States and Great Britain) and the principles of the civil law. Whatever is fundamental to those two main systems of law that control

the civilized world, is properly applicable by this Tribunal as a guide in its decisions.

But suppose that those fail—and I am not certain but that under certain conditions the principle that I am now going to suggest would control and override any of the three preceding, even did any or all of the sources indicated contain principles applicable to and sufficient to dispose of the case—then inasmuch as this is an arbitration between two countries having more or less similar systems of government, two countries of essentially the same race, with the same language and the same fundamental laws, this Tribunal should go to the fundamental principles of the laws of the two countries for the guidance which it may need in a particular case. To this point and conclusion I understood my learned friend, Mr. Newcombe, yesterday to speak when he suggested that the law of France as to possession did not apply with reference to the discussion of the case of the "Yukon Lumber," but that the laws and principles common to the two countries interested should be exclusively invoked.

Again, I take it that if these all fail that then the plaintiff government in a given case has a right to call the Tribunal's attention to any positive principle of law of the defendant nation and insist that such a provision of law shall be administered in favor of the plaintiff government in that particular case.

And finally, possibly, in the absence in such cases, of a principle of positive law of the defendant obligating the defendant to give the relief asked for by the plaintiff government, that then an affirmative principle of law of the plaintiff government might be invoked.

I submit these observations as the views of the Government of the United States as to the scope and meaning of the phrase of the Special Agreement "principles of international law" as it is to be understood and applied in this particular arbitration between the two governments concerned. It is from the various sources indicated that in the appropriate cases this Tribunal should gather the principles of so-called international law which it is to administer in these proceedings.

I come now to the third provision, and I have to request the Tribunal to look carefully at the language of Article 7: The decision is to be "in accordance with treaty rights and with the principles of international

law and of equity." As was pointed out by my learned friend this morning, this provision does not say "or equity." To that observation I would desire to add this: It does not, moreover, say "with equity"; it does not say "or with equity"; nor does it say "and equity." It says, "the principles of international law and of equity." That is to say, under any proper grammatical construction, "principles" comes over from "international law" and is to be understood before the phrase "of equity," so that the sentence should read in the same way as if it had been written "the principles of international law and the principles of equity."

Taking that as a starting point, I take it that "the principles of equity"—not merely "equity" or "justice and equity"—must by this Tribunal be given a technical interpretation. There has been a great looseness of usage and interpretation of the term *equity* by international tribunals. For example, international tribunals have said where they were operating under a convention requiring that they should do justice and equity, that what they were to do was to administer abstract equity regardless of the law; that they were to try to conceive what was the abstract equity involved in any particular case, and apply that to the case in hand. It is an error, far-reaching and fatal, for international tribunals charged with the enforcement of law to undertake to administer international justice in accordance with the conceptions of equity which may be entertained by the particular arbitrator who may be sitting upon the case.

Fortunately for the development of international arbitration, this general theory of making equity equal the conscience of the judge sitting as a court, is not new; it was widely applied in the earlier years of the development of English equity. It was thoroughly tried and found wanting. In the course of that experience it became perfectly evident that law and order, stability and progress, did not lie along that road. On this point may I call the attention of the Tribunal to the words, oft quoted, of the great Selden, who made use of this expression—and I may say that Mr. Spence, the very learned English commentator upon equity, says that nobody knew more about equity than Selden,—

"Equity," says Selden, "is a Roguish thing, for law we have a measure, know what to trust to; Equity is according to the conscience of him

that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure we call (a foot) a Chancellor's foot, what an uncertain measure this would be! One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot; 'Tis the same thing in the Chancellor's Conscience."

May I repeat that the question of developing a jurisprudence by virtue of the individual conscience of the judge passing upon the cases presented to him was tried out in the development of English equity long before we brought it to this country and incorporated it as a part of our law.

Later, however, the fundamental fallacy of the system having become apparent, there was a change, so that Lord Mansfield, one of the greatest English judges, was able to say that—

A court of equity is as much bound by positive rules and general maxims concerning property (though the reason of them may now have ceased) as a court of law is.

In other words, it was found absolutely necessary in order that justice might be certain, in order that people might know what their rights were, might know what they could do and what they could not do, that the principles of equity should be fixed and determined within certain general broad lines; and Lord Eldon still later said, speaking in the case of *Gee vs. Pritchard*, a case involving an injunction against the printing of certain letters:

If I had written a letter on the subject of an individual for whom both the person to whom I wrote and myself had a common regard, and the question arose for the first time, I should have found it difficult to satisfy my mind that there is a property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord Hardwicke and Lord Apsley. The doctrines of this Court ought to be as well settled, and made as uniform almost as those of the common law, laying down fixed principles but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot.

The point that I wish to make from this is that in developing an international jurisprudence—and this honorable Tribunal will have its due and a great share in such development—the question of what is equity broadly and generally must be carefully considered in order that it may not be, as was the earlier equity of the English courts, made synonymous with individual personal conscience to the almost certain scandal of international arbitration.

It moreover appears to me that the term "principles of equity" are "terms of art," since they are principles which are common to both countries. Now it is well settled that where terms of art are used in a treaty the terms should be interpreted in accordance with the law of the two countries concerned.

In this case the meaning of these terms is the same in both countries. Therefore, it seems to me that "principles of equity," as used in the Special Agreement, is to be understood as meaning, broadly and generally, the principles of equity invoked and applied in the equity jurisprudence as understood and administered in the two countries.

Under the interpretation which is thus given to Article VII of the Special Agreement, treaty rights, the principles of international law, and the principles of equity become amply sufficient and adequate to determine all questions coming before the Tribunal, without the necessity of resort to the varying and indefinite conceptions of abstract equity or conscience.

Turning now again to the Terms of Submission. Article II of these Terms provides:

"The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim any admission of liability by the Government against whom a claim is put forward."

Article III provides:

"The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimants to obtain satisfaction through legal remedies which are open to him or placed at his disposal, but no claim shall be disallowed or rejected by application of the general principle of international law that the legal

remedies must be exhausted as a condition precedent to the validity of the claim."

And Article IV stipulates:

"The Arbitral Tribunal if it considers equitable may include" a certain amount of interest.

That is, there are in the Terms of Submission themselves three things that are noted as equities to be considered by this court—the question of admission, the question of exhaustion of legal remedies, and the question, under favorable circumstances, of awarding interest.

What is the meaning of equities in those terms of submission? In my judgment it means the same thing here that it would mean in the equitable jurisprudence of the two countries. That is, the same fundamental propositions that would guide and control courts acting under the equitable jurisprudence of the two countries should guide and control here.

On the point of the meaning and purpose of equity, I should like to read the statement of the Master of the Rolls, Sir John Trevor, who made the following comment:

Now, equity is not part of the law, but a moral virtue which qualifies, moderates, and reforms the rigor, hardness and edge of the law, and is a universal truth. It does also assist the law where it is defective and weak in the constitution, which is the life of the law; and defends the law from crafty evasions, delusions, and new subtleties invented and contrived to evade and delude the common law, whereby such as have undoubted rights are made remediless. And this is the office of equity, to protect and support the common law from shifts and contrivances against the justice of the law. Equity, therefore, does not destroy the law, nor create it, but assists it.

Story, the first great commentator upon Equity Jurisprudence in the United States, makes the following comment:

Sir James Mackintosh, in his Life of Sir Thomas More, says: "Equity in the acceptation in which the word is used in English jurisprudence, is no longer to be confounded with that moral Equity, which generally corrects the unjust operation of law, and with which it seems to have been synonymous in the days of Selden and Bacon. It is a part of laws formed from usages and determinations, which sometimes differ from what is called Common Law in its subjects; but chiefly varies from it in its modes of proof, of trial, and of relief. It is a jurisdiction so irregularly formed, and often so little dependent upon general principles, that

it can hardly be defined or made intelligible, otherwise than by a minute enumeration of the matters cognizable by it." There is much of general truth in this statement; but it is, perhaps, a little too broad and undistinguishing for an accurate equity lawyer. Equity, as a science, and part of jurisprudence, built upon precedents, as well as upon principles, must occasionally fail in the mere theoretical and philosophical accuracy and completeness of all its rules and governing principles. But it is quite as regular, and exact in its principles and rules, as the Common Law; and, probably, as any other system of jurisprudence, established, generally, by positive enactments, or usages, or practical expositions, in any country, ancient or modern. There must be many principles and exceptions in every system, in a theoretical sense, arbitrary, if not irrational; but which are yet sustained by the accidental institutions, or modifications of society, in the particular country where they exist. There are wide differences between the philosophy of law, as actually administered in any country, and that abstract doctrine, which may in matters of government, constitute, in many minds, the law of philosophy.

This last is the point I desire to bring forth particularly,—that a distinction must be drawn between the law of philosophy and the law which may be applicable as between two countries at difference over legal questions.

One more quotation on this matter from Mr. Pomeroy, one of our modern American authorities on Equity:

I am now prepared to examine, and if possible determine, the true nature of equity considered as an established branch of our American as well as of the English jurisprudence. We are met at the very outset by numerous definitions and descriptions taken from old writers and judges of great ability and high authority, many of which are entirely incorrect and misleading, so far at least as they apply to the system which now exists, and has existed for several generations. These definitions attribute to equity an unbounded discretion, and a power over the law unrestrained by any rule but the conscience of the Chancellor, wholly incompatible with any certainty or security of private right. For the purpose of illustrating these loose and inaccurate conceptions, I have placed in the foot-note a number of extracts taken from the earlier writers.

It is very certain that no court of chancery jurisdiction would at the present day consciously and intentionally attempt to correct the rigor of the law or to supply its defects, by deciding contrary to its settled rules, in any manner, to any extent, or under any circumstances beyond the already settled principles of equity jurisprudence. Those principles and doctrines may unquestionably be extended to new facts and circumstances as they arise, which are analogous to facts and circumstances that have already been the subject-matter of judicial decision, but this

process of growth is also carried on in exactly the same manner and to the same extent by the courts of law. Nor would a chancellor at the present day assume to decide the facts of a controversy according to his own standard of right and justice, independently of fixed rules,—he would not attempt to exercise the *arbitrium boni viri*; on the contrary, he is governed in his judicial functions by doctrines and rules embodied in precedents, and does not in this respect possess any greater liberty than the law judges.

From these authorities there may be gathered the meaning of equity and the purpose of equity.

Coming now to the question of admissions, on this point I wish briefly to say: The United States did not intend nor does it desire, to avoid any undertaking, any obligation which it has consciously made or incurred; and I am perfectly sure that His Britannic Majesty's Government are animated by the same spirit; moreover, neither government will wish to secure an award before this Tribunal on any undertaking not consciously given!

I think we cannot overlook the fact that we are here something more than mere litigants before a private tribunal. We are facing each other here practically as sovereign to sovereign and everything that is due from sovereign to sovereign is due to and from us here.

But this brings with it the necessary accompaniment. We must protect each the rights of his own sovereign or, to put it otherwise, the rights of sovereignty. Neither is in a position to permit to pass unchallenged any contention or argument which would in any way impair the sovereignty he represents. Moreover, I take it the Tribunal would wish to lay down no principles that would impair the rights of sovereignty of either party; nor, I apprehend, do they wish to lay down new principles which will either affect generally or override the already settled fundamental principles and rules of the law of nations.

It is with these considerations in view that as representing the United States, I must take exception to any doctrine or principle which would erect into the dignity of a formal obligation against the Government of the United States the statements of subordinate executive officers or any officers not duly authorized to represent and speak to a foreign government for the United States with a view to creating obligations.

It is impossible to tell where a contrary doctrine would lead. Should

we stop with communications from the President to the Congress; or from the head of a department to the President; or from the head of one department to the head of another department; or from the head of a subordinate office or bureau of the department to the head of the department? One could not tell where to draw the line if one did not look strictly to the rules and laws that govern in such cases.

Moreover, if the principle were established that a report, that an expression of an opinion by different officers of government one with another, created an obligation in favor of a foreign government or of a citizen or subject of a foreign government, government itself would be paralyzed and destroyed; for no one can tell how far that matter would reach. It would be impossible to foresee what might be said by some ill-advised, inefficient or even corrupt subordinate officer and then invoked against the government itself as establishing a legal liability against it.

On this point I might refer to the fact, well known, of how carefully nations guard against the contracting of obligations when they fully sense and know they are engaged in such a transaction; for example, the negotiation, conclusion, and ratification of treaties. No country concludes a treaty of any importance with another country without demanding the exhibition of full powers from the person authorized to negotiate and sign the treaty. Governments perfectly understand that in dealing with one another in the creation of obligations they deal in certain prescribed ways and in accordance with certain conventional forms, and that if those forms and those ways are not followed the nation is not bound.

On this point I must ask the indulgence of the Tribunal to follow me in a few quotations showing the attitude of the Government of the United States on these points.

First, I wish to say that with the Government of the United States the Executive is the national spokesman with reference to foreign governments. When the United States has anything to say to a foreign government it is said through the Executive.

Mr. Moore, narrating an incident in 1793, says:

The French Minister, having in 1793, requested an *exequatur* for a consul whose commission was addressed to the Congress of the United

States, Mr. Jefferson replied that as the President was the only channel of communication between the United States and foreign nations, it was from him alone "that foreign nations or their agents are to learn what is or has been the will of the nation;" that whatever he communicated as such, they had a right and were bound to consider "as the expression of the nation"; and that no foreign agents could be "allowed to question it," or "to interpose between him and any other branch of Government, under the pretext of either's transgressing their functions." Mr. Jefferson therefore declined to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents. "I inform you of the fact," he said, "by authority from the President." Mr. Jefferson therefore returned the consul's commission and declared that the President would issue no exequatur to a consul except upon a commission correctly addressed.¹

Again, the Secretary of State is the organ of official communication between the Government of the United States and foreign governments. He only speaks authoritatively.

(I may remark that I am reading only selected extracts and you will find a great many precedents herein collected with which I do not trouble you.)

As I said, the Secretary of State is the organ of official communication. On this point I desire to read from Moore, Vol. IV, page 780:

There shall be at the seat of government an executive department to be known as the Department of State and a Secretary of State, who shall be the head thereof.

The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers, or consuls from the United States, or to negotiations with public ministers from foreign States or Princes, or to memorials, or other applications from foreign public Ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct.²

Mr. Seward when Secretary of State, in an instruction to the American Minister to France, said:

This Department is the legal organ of communication between the President of the United States and foreign countries. All foreign powers

¹ Mr. Jefferson, Secretary of State, to Mr. Genet, November 22, 1793, Moore's Digest, Vol. IV, p. 680.

² Revised Statutes, Section 202.

recognize it and transmit their communications to it, through the dispatches of our Ministers abroad, or their own diplomatic representatives residing near this Government. These communications are submitted to the President, and, when proper, are replied to under his direction by the Secretary of State. This mutual correspondence is recorded and preserved in the archives of this Department. This is, I believe, the same system which prevails in the governments of civilized states everywhere.³

Turning now to the question of the effect of communications from the President to the Congress, in connection with this question of admissions, it has always been the position of the United States that such communications were private communications, passing, if you will, between members of the family; that foreign nations were not entitled to question them, were not bound by them, and that the foreign government became interested only when the determination of Congress was conveyed to them.

In 1835 Mr. Forsyth, Secretary of State, in writing to Mr. Livingston, our Minister to France, said:

The President corresponds with foreign governments through their diplomatic agents, as the organ of the nation. As such he speaks for the nation. In his messages to Congress he speaks only for the Executive to the legislature. He recommends, and his recommendations are powerless, unless followed by legislative action. No discussion of them can be permitted. All allusions to them, made with a design to mark an anticipated or actual difference of opinion between the Executive and legislature, are indelicate in themselves.⁴

Mr. Marcy, Secretary of State, in 1856, said:

The President's annual message is a communication from the Executive to the legislative branch of the Government; an internal transaction, with which it is not deemed proper or respectful for foreign powers or their representatives to interfere, or even to resort to it as the basis of diplomatic correspondence. It is not a document addressed to foreign governments.⁵

Again, in 1875, Mr. Fish, addressing a communication to our Minister to Turkey, said:

The Turkish Minister having produced a volume of Foreign Relations of the United States, and commented on the circumstance that the

³ Moore's Digest, Vol. IV, p. 781.

⁴ Moore's Digest, Vol. IV, p. 685.

⁵ Moore's Digest, Vol. IV, p. 684.

correspondence of the Department of State with its consular officers in Tripoli and Tunis was arranged under the head of "Barbary States" instead of "Turkey" his attention was called to the fact "that the volume to which he referred * * * was a communication addressed by the President to Congress, and not one addressed to foreign governments (although we furnished them with copies of this, as we do of all or nearly all of our public documents)," and "that the arrangement to which he had referred was not intended to convey any special political significance, but was one of usage and of domestic convenience."⁶

In this connection it may be observed that if communications on matters such as those under discussion with Turkey are not for the cognizance of foreign Powers, that is, if foreign Powers are not bound by them or have no interest in them, then where the President transmits to Congress a recommendation for the payment of a claim made by an alien against the Government of the United States as a matter of grace, as a matter of sovereign favor, it surely cannot be that that recommendation can be taken as an admission of liability upon the part of this government to compensate said alien. If it is to be ruled that the President of the United States cannot recommend to Congress as a matter of grace and favor any claim of an alien against the Government of the United States without thereby raising against the United States an obligation of liability, obviously such matters of favor and grace must cease; because as the President has no control over Congress, no control over the appropriations of Congress, can only recommend to Congress, he cannot afford to undertake, nor can the Government of the United States afford to have him attempt to undertake to do the proper, the right, the just, or the equitable thing without running the danger of having invoked against the United States the admission of a positive legal liability in the case.

Again, I say that only statements made by the Secretary of State are to be regarded as binding upon this government, and even then, and in respect to that, I would add the further contention and argument that it must be understood that foreign governments, and they have been dealing with the United States for 125 years, must know that the Secretary of State himself has not full powers to bind this government, that he himself is circumscribed, that the President whom he

⁶ Moore's Digest, Vol. IV, p. 686.

represents is circumscribed, that they cannot by themselves, that is the Executive, obligate this government to pay a claim; and foreign governments receiving assurances from the national Executive would, I take it, be taken to know that the Secretary of State in making any such declaration, was exceeding his well recognized and established authority, and was giving an undertaking of no force or value.

I do not need, however, to go that far with reference to the cases before us.

As to the "admissions of liability" contemplated in the Terms of Submission, I must observe that this expression cannot mean duly authorized and binding admissions of legal liability by the proper officer of government, since if such an admission were produced I see little left for the Tribunal to decide unless it be the question of the amount. Surely such an admission would be entitled to more consideration than an equity; it would be of the essence. It cannot be that such admissions were in contemplation.

Now I want to draw a distinction, however, between such duly authorized admissions of legal liability and certain so-called admissions which have been used in the course of the argument here before the Tribunal—and, I submit, properly used.

If a subordinate officer of the American Government, either a Cabinet officer or one subordinate to a Cabinet officer, has made an "admission," so-called, of legal liability, if he has said that in his opinion the United States is legally liable on some claim, I submit that such an "admission" does not impose upon the United States an obligation, though it may be appropriately used for what it is worth—little, I think—as an evidence of what the law is on that transaction. But it may not be used as evidence that the United States has admitted a liability, because the party making it has no authority to make such an admission. Moreover, admissions of persons as to facts may be appropriately used. For example, if in a collision case the captain of the American boat in a report to his chief says that the facts of this transaction were so and so, I submit that His Majesty's Government have a right to introduce such a report as evidence of the facts and the report should be so considered. But such a statement as that does not constitute, and was never intended to constitute, an admission of legal liability by this government.

And to repeat what I said a few moments ago, if that does constitute an admission of liability, then I say to you that government is threatened.

In this connection I submit that Mr. Newcombe's use of the letter yesterday from Lieutenant Tillman regarding the time of delivery of those logs was a pertinent and proper use. He invoked it as evidence of the time when the logs were delivered, and however much I would disagree with him—as I would—as to the interpretation which he placed upon that letter, nevertheless that was evidence which he had a right to introduce and upon which the Tribunal has a right to rely, or at least to consider, in the matter of determining the facts.

One word more and I will have finished.

As covering this whole question of the meaning of the terms of the Special Agreement and the danger that will come from this Tribunal or any arbitral tribunal undertaking to do anything other than administer the law, and in some few cases consciously and carefully probably extending it, I may be permitted to observe that if nations come to feel in submitting differences to arbitration that the decision will probably not be according to the law involved but will be according to the ideas of the Tribunal, as to abstract right and justice, then I say to you arbitration cannot live. No nation would know where an arbitral tribunal might go in a controversy to which it was a party. As I understood the position taken by my learned friend today, it was that the decisions of this Tribunal must be in accordance with the law, international law, with treaties, with the principles of equity—

Sir CHARLES FITZPATRICK. Are those alternative or cumulative expressions—international law and equity?

Mr. CLARK. The agreement contemplates the principles of international law and the principles of equity.

Sir CHARLES FITZPATRICK. Yes; the principles of international law as governed by the principles of equity, or are they disjunctive?

Mr. CLARK. I think they are disjunctive, sir.

Sir CHARLES FITZPATRICK. Alternative?

Mr. CLARK. Yes, sir.

Sir CHARLES FITZPATRICK. Where there is a principle of international law that principle has to be applied in its entirety. Failing in the prin-

ciple of international law, then in the alternative you take the principle of equity?

Mr. CLARK. Yes; but understanding international law to comprise the other matters which to my mind coördinate with the strict international law and complement it, and which I referred to and discussed in the beginning of my remarks.

Sir CHARLES FITZPATRICK. Quite right.

Mr. CLARK. Unless the Tribunal develops the law in that way and unless the principles governing the Tribunal are these, arbitration is certainly in a precarious condition, because nations will not, they cannot afford, under the existing conditions of the world, to submit questions to determination by arbitral tribunals unless they have the confidence and assurance that the tribunal will in its deliberations and determinations be guided by the fixed and settled rules and principles properly applicable and controlling.

THE AMERICAN CONSTRUCTION OF THE MOST-FAVORED-NATION CLAUSE¹

CONCESSIONS IN IMPORT DUTIES

In a communication to the Congress of the Confederation, February 20, 1787, the Netherlands minister protested against an Act of the legislature of the State of Virginia, which exempted French brandies imported in French and American vessels from certain duties to which like commodities imported in vessels of the Netherlands were left liable, as in contravention of the most-favored-nation clause in Article II of the treaty of 1782. This article provided that the subjects of the Netherlands should pay in the ports of the United States no other or greater duties or imposts of whatever nature or denomination than those which the nations the most favored were or should be obliged to pay; and that they should enjoy all the rights, liberties, privileges, immunities and exemptions in trade, navigation and commerce which the most favored nations did or should enjoy. The article contained no express qualification that the favor or privilege should be extended freely if freely given or for an equivalent if conditional. John Jay, the Secretary for the Department of Foreign Affairs, to whom the protest had been referred, in his report to Congress in October, 1787, said:

It is observable that this article takes no notice of cases where compensation is granted for privileges. Reason and equity however, in the opinion of your Secretary, will supply this deficiency. * * * Where a privilege is gratuitously granted, the nation to whom it is granted becomes in respect to that privilege a favored nation * * * but where the privilege is not gratuitous, but rests on compact, in such case the favor, if any there be, does not consist in the privilege yielded but in the consent to make the contract by which it is yielded. * * * The favor therefore of being admitted to make a similar bargain is all that in such cases can reasonably be demanded under the article. Be-

¹ An address before the Fifth Annual Meeting of the American Society of International Law, April 29, 1911 (Proceedings, 240), has been incorporated in this article.—S. B. C.

sides, it would certainly be inconsistent with the most obvious principles of justice and fair construction, that because France purchases, at a great price, a privilege of the United States, that therefore the Dutch shall immediately insist, not on having the like privileges at the like price, but without any price at all.²

It may give additional weight to the view as here expressed to note that in the opinion of the Secretary, the reduction in question of the duty on French brandies by the State of Virginia having been gratuitous, the subjects of the Netherlands were entitled to the same reduction. This rule of construction of the most-favored-nation clause as formulated by Jay,—that a concession made for valuable consideration does not pass automatically and without equivalent to the favored nation,—has been consistently maintained, at least in respect of special concessions in import duties, by subsequent Secretaries of State—by Secretaries Adams, Van Buren, and Clay, in respect of Article VIII of the treaty of April 30, 1803, with France; by Secretary Livingston in respect of Articles V and IX of the treaty of August 27, 1829, with Austria; by Secretary Frelinghuysen in respect of Article II of the treaty of July 3, 1815, with Great Britain; by Secretaries Bayard, Gresham, and Sherman in respect of various treaties.³ The reason of the rule is stated by Mr. Sherman, Secretary of State, as follows:

It is clearly evident that the object sought in all the varying forms of expression is equality of international treatment, protection against the wilful preference of the commercial interests of one nation over another. But the allowance of the same privileges and the same sacrifice of revenue duties, to a nation which makes no compensation, that had been con-

² The same view was taken by Jefferson as to a most favored nation clause, when conditionally expressed, in a letter to Monroe, Dec. 10, 1784. *Writings* (Ford ed.), IV, 19. See also *Writings of Monroe*, I, 36.

³ See Moore, *Int. Law Digest*, V, 257-319. See also *Memorandum by John Ball Osborne*, Sen. Doc. 29, 62d Cong. 1st Sess. The position taken by the government in 1898, in reference to the most-favored-nation clause in the treaty of 1850 with Switzerland, is not an exception to the rule. There appeared to be an agreement between the parties in respect of the interpretation to be placed upon the clause. *For Rel.*, 1899, 746-748. As to the rule of construction in foreign countries, see M. L. E. Visser, *Revue de Droit International et de Législation Comparée*, 1902 (2nd series), IV, 66, 159, 270; S. K. Hornbeck, *American Journal of International Law*, III, 395, 619, 797; C. C. Hyde, *id.*, III, 57; J. R. Herod, *Favored Nation Treatment*; and N. D. Harris, *Proceedings of American Society of International Law*, Fifth Annual Meeting (1911), 228.

ceded to another nation for an adequate compensation, instead of maintaining, destroys that equality of market privileges which the "most-favored-nation" clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price. It would thus become the source of international inequality and provoke international hostility.⁴

The same rule has, as regards special concessions in import duties based upon valuable considerations, been applied by the Supreme Court. In the case of *Whitney v. Robertson*, the court, by Mr. Justice Field, said:

In *Bartram v. Robertson*, decided at the last term (122 U. S. 116), we held that brown and unrefined sugars, the produce and manufacture of the island of St. Croix, which is part of the dominions of the king of Denmark, were not exempt from duty by force of the treaty with that country, because similar goods from the Hawaiian Islands were thus exempt. The first article of the treaty with Denmark provided that the contracting parties should not grant "any particular favor" to other nations in respect to commerce and navigation, which should not immediately become common to the other party, who should "enjoy the same freely if the concession were freely made, and upon allowing the same compensation if the concession were conditional." 11 Stat. 719. The fourth article provided that "no higher or other duties" should be imposed by either party on the importation of any article which is its produce or manufacture, into the country of the other party, than is payable on like articles, being the produce or manufacture of any other foreign country. And we held in the case mentioned that "those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the king of Denmark, to each other, that in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges."

The counsel for the plaintiffs meet this position by pointing to the omission in the treaty with the Republic of San Domingo of the provision as to free concessions, and concessions upon compensation, contending that the omission precludes any concession in respect of commerce and navigation by our government to another country, without that

⁴ Inst. to Mr. Buchanan, Jan. 11, 1898. Moore, *Int. Law Digest*, V, 278.

concession being at once extended to San Domingo. We do not think that the absence of this provision changes the obligations of the United States. The 9th article of the treaty with that republic, in the clause quoted, is substantially like the 4th article in the treaty with the king of Denmark. And as we said of the latter, we may say of the former, that it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has no greater extent. It was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.⁵

Accordingly, to entitle the claimant under the most-favored-nation clause, even if not conditionally expressed, to the privilege or concession, it must appear either that the particular privilege claimed has been extended gratuitously to the third Power; or that the claimant nation has extended to the United States the exact equivalent for which the particular privilege was extended to the third Power; or that the act depriving the claimant of the particular privilege claimed is discriminatory. If the privileges claimed have been specifically extended by treaty stipulations, they are presumed to have been based upon a consideration and not to have been gratuitous, for the usual purpose of a treaty is to secure benefits for concessions, not to record the exchange of free gifts. This presumption does not arise if the privileges have been extended unconditionally by acts of legislation, not in execution of treaty stipulations, for such acts are not presumably the result of negotiation with foreign nations. It has been held by the Court of Customs Appeals that the right of free entry into the United States of untaxed pulp made from untaxed wood, provided for in section 2 of the Act of July 26, 1911, "to promote reciprocal trade relations with the Dominion of Canada and for other purposes," was granted by the United States to Canada without consideration, and that the same right of free entry therefore passed automatically to other Powers enjoying most-favored-nation

⁵ 124 U. S. 190. See also *Shaw & Co. v. United States*, 20 Treasury Decisions, No. 16, p. 35; 1 Ct. Cust. Apps. 426; *Taylor v. Morton*, 2 Curtis, 454; *Ropes v. Clinch*, 8 Blatchf. 304.

treatment.⁶ In treaties of commerce the equivalent for which a particular concession is made may be such that the exact equivalent can be offered by no other nation, such, for instance, as considerations based upon extent of territory, population, variety of products, and propinquity. So also the treaty may comprise various articles, of which a particular article may be consented to by one of the parties in consideration of benefits received in other articles.

Attorney General Williams, however, advised that the provisions of Article IV of the treaty with Belgium of July 17, 1858, exempting steam vessels of the United States and of Belgium engaged in regular navigation between the two countries, from the payment of tonnage, anchorage, and light-house dues, became immediately applicable, *mutatis mutandis*, to Sweden and Norway, by virtue of Article II of the treaty of April 3, 1783 and Articles VIII and XVII of the treaty of July 4, 1827 with those countries, and to Bremen, by virtue of Article IX of the treaty of December 20, 1827 with the Hanseatic Republics.⁷ This view was accepted by the Government of the United States, and resulted in the termination of the treaty with Belgium, pursuant to notice.⁸ In case of Sweden and Norway, it appeared that no line of steam vessels of the United States was, at the time, engaged in regular navigation between the United States and Sweden and Norway. Accordingly, it could not with certainty be stated, observed the Attorney General, whether tonnage duties would or would not be levied on American vessels in the ports of those countries. "It is," he concluded, "to be presumed that they will, when the occasion shall arise, faithfully perform their duty under the treaties; for the obligations imposed by them are reciprocal." In case of Bremen, it appeared that no tonnage tax was imposed on American vessels entering from ports of the United States.

With respect to discriminatory legislation, it has been held that an Act of Congress of June 26, 1884, sec. 14, which imposed a duty of three

⁶ Importations from Norway, Russia, Austria-Hungary, and Germany were involved in the decision, *American Express Co. et al. v. United States*, and *Bertuch & Co. et al. v. United States*, dated May 12, 1913, and printed in Judicial Decisions in this number of the JOURNAL.

⁷ 14 Op. 468, 530. See also 16 Op. 276, 626.

⁸ Notes to *Treaties and Conventions*, between the United States and other powers, 1776-1887, p. 1248.

cents per ton on all vessels from any foreign port in "North America, Central America, the West India islands, the Bahama islands, the Bermuda islands, or the Sandwich islands or Newfoundland," and a duty of six cents per ton on vessels from all other foreign ports, did not entitle German vessels entering the United States from European ports to the three cent rate, under the treaties of December 20, 1827 and May 1, 1828, since the classification was merely geographical, the three cent rate applying to vessels of all nations coming from the privileged ports.⁹ So also it has been held that a State pilotage law subjecting all vessels, domestic and foreign, engaged in foreign trade to pilotage regulations, but exempting pursuant to law coastwise steam vessels of the United States, was not in conflict with the provisions in the treaty with Great Britain stipulating that British vessels should not be subject to any higher or other charges than vessels of the United States, since such exemption did not "operate to produce a discrimination against British vessels engaged in foreign trade and in favor of vessels of the United States in such trade."¹⁰ Attorney General Olney, in an opinion dated November 13, 1894, advised that Germany was not, by virtue of the most-favored-nation clause in the treaty of May 1, 1828, entitled to the free entry of salt into the United States under paragraph 608 of the Tariff Act of August 27, 1894. This paragraph placed salt on the free list, but provided that the rate of duty existing prior to the passage of the Act should be collected on salt imported from any country which imposed a duty on salt exported from the United States. American salt was dutiable on importation into Germany. In the course of the opinion, the Attorney General said:

The form which the provisions of our recent tariff act relating to salt may have assumed is quite immaterial. It enacts, in substance and effect, that any country admitting American salt free shall have its own salt admitted free here, while any country putting a duty upon American

⁹ *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. 17. See, to like effect, 18 Op. Atty. Gen. 260.

¹⁰ *Olsen v. Smith*, 195 U. S. 332, 344. See also *Compagnie Francaise &c. v. Louisiana State Board of Health*, 186 U. S. 380, 394, dissenting opinion of Mr. Justice Brown, 397, 400; *Powers v. Comly*, 101 U. S. 789; *Head Money Cases*, 112 U. S. 580; *Thingvalla Line et al. v. United States*, 24 C. Cls. 255.

salt shall have its salt dutiable here under the pre-existing statute.¹¹ In other words, the United States concedes "free salt" to any nation which concedes "free salt" to the United States. Germany, of course, is entitled to that concession upon returning the same equivalent. But otherwise she is not so entitled, and there is nothing in the "most-favored-nation clause" which compels the United States to discriminate against other nations and in favor of Germany by granting gratuitously to the latter privileges which it grants to the former only upon the payment of a stipulated price.¹²

The same conclusion was reached by the Court of Customs Appeals as to concessions for reciprocal considerations made under sec. 3 of the Tariff Act of 1897.¹³ The court said:

Section 3 of the tariff act of 1897 was a general law; its attitude toward every nation was uniform. It offered no special favor to France, or Germany, or Italy, or any other country. Every foreign nation was treated alike by the terms of the law. It was equally within the opportunity of England to negotiate a reciprocity treaty as it was within the opportunity of France.

ADMINISTRATION ON ESTATES OF DECEASED ALIENS

State courts have in various cases coming before them held that the consuls of a nation enjoying most-favored-nation treatment were entitled to privileges and rights in administration on the estates of deceased countrymen extended by treaty to consuls of a third nation. The Supreme Court of Louisiana has, for instance, held that French consuls, by virtue of the most-favored-nation clause in Article XII of the treaty with France of 1853, have the same right as enjoyed by Belgian consuls under Article XV of the treaty with Belgium of 1880, to appear in all proceedings on behalf of absent or minor heirs.¹⁴ The surrogates of Westchester¹⁵ and Albany¹⁶ counties of New York, the Appellate Division of the Supreme Court of New York¹⁷ and the Supreme Court of

¹¹ 21 Op. 80.

¹² *Shaw & Co. v. United States*, 20 Treasury Decisions (31500), No. 16, p. 35; 1 Ct. Cust. Apps. 426.

¹³ *Succession of Robasse*, 47 La. Ann. 1452; 49 *Id.* 1405. See also *Succession of Amat*, 18 *Id.* 405; *In re Peterson's Will*, 101 N. Y. S. 285.

¹⁴ *In re Fattosini's Estate*, 67 N. Y. S. 1119, and *In re Lobrasciano's Estate*, 77 N. Y. S. 1040.

¹⁵ *In re Silvetti's Estate*, 122 N. Y. S. 400.

¹⁶ *In re Scutella's Estate*, 129 N. Y. S. 20.

Alabama¹⁷ have held that Italian consuls, by virtue of the most-favored-nation clause in Article XVII of the consular convention between the United States and Italy of May 8, 1878, were entitled to all the rights and privileges in the administration on the estates of deceased countrymen enjoyed by consuls of the Argentine Republic under Article IX of the treaty of July 27, 1853.¹⁸ Article IX of the Argentine treaty was construed in each of these cases as conferring on the consul the right of administration in preference to the public administrator as provided for in the local laws. The same view was taken by the Supreme Judicial Court of Massachusetts¹⁹ as to the rights of a Russian consul under the most-favored-nation clause in Article VIII of the treaty of 1832 between the United States and Russia. The surrogate of New York county²⁰ placed a different construction on the Argentine treaty.

In each of the above cases the court merely considered the question whether the right claimed was embraced in the terms of the Argentine treaty. It does not appear that the right of the consular officer to invoke, under the most-favored-nation clause, any privilege extended by treaty to consuls of a third Power, was questioned. In a case coming before the District Court of Appeal of California, this right was questioned;²¹ but neither that court nor the Supreme Court of California, affirming the decision, found it necessary to decide this question. The claim was denied on the ground that Article IX of the Argentine treaty was not intended to commit to the consular officers the administration in preference to those entitled by the local law.²² This decision was affirmed by the Supreme Court of the United States.²³ The question whether the most-favored-nation clause in the Italian treaty automatically carried the privileges of the Argentine treaty in this respect was expressly excepted by the court from its decision. It was held that even the terms of Article IX of the Argentine treaty, which provide that in case a citizen of either of the contracting parties shall die intestate

¹⁷ *Carpigiani v. Hall*, 55 So. 248.

¹⁸ See, also, *In re Davenport*, 89 N. Y. S. 537; *In re Bristow*, 118 N. Y. S. 686.

¹⁹ *McEvoy v. Wyman*, 191 Mass. 276.

²⁰ *In re Logiorato's Estate*, 69 N. Y. S. 507.

²¹ *In re Ghio's Estate*, Am. Journal of Int. Law, IV, 726.

²² 157 Cal. 552.

²³ *Rocca v. Thompson*, 223 U. S. 317.

in the territories of the other the proper consular officer of the country to which the deceased belonged "shall have the right to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country," were not intended to give to the consul the right of original administration to the exclusion of one authorized by local law to administer the estate. In the argument before the court it was urged that the rights and privileges enjoyed by Argentine consuls were granted for and in consideration of valuable rights and privileges granted by the Argentine Republic under the treaty to American consuls; and that, under the rule applied in the case of *Whitney v. Robertson*, in respect of valuable concessions in import duties, these rights and privileges granted to Argentine consuls for valuable equivalents did not pass automatically and without equivalents to third Powers. It has subsequently been held by the Supreme Court of Minnesota that Article XIV of the treaty with Sweden of June 1, 1910,—the provisions of which had been invoked by an Austrian consul under the most-favored-nation clause in Article XV of the treaty with Austria of July 11, 1870,—gave to the consul the right to administration only so far as the local laws permitted.²⁴ The surrogate of New York county has held that Article X of the treaty with Paraguay of February 4, 1859, and Article XIV of the treaty with Sweden of June 1, 1910, gave to consuls of these countries the right to administration; and that the same right was, by virtue of the most-favored-nation clause, enjoyed by consuls of Italy,²⁵ and of Austria-Hungary.²⁶ Likewise, the surrogates of Schenectady,²⁷ Herkimer,²⁸ and Erie²⁹ counties, New York, have ruled that an Italian consul, invoking by virtue of the most-favored-nation clause, the provisions of Article XIV of the treaty between the United States and Sweden of June 1, 1910, has the right to administration on the estate of an Italian subject dying intestate in the United States. In the first named case the right of the consul was upheld in preference to a distant resident relative not entitled to succeed.

²⁴ *In re Estate of Lis*, 139 N. W. 300.

²⁵ *In re Baglieri's Estate*, 137 N. Y. S. 175.

²⁶ *In re Jarema's Estate*, 137 N. Y. S. 176.

²⁷ *In re Lombardi*, 138 N. Y. S. 1007.

²⁸ *In re Ricardo*, 140 N. Y. S. 606.

²⁹ *In re Madaloni's Estate*, 141 N. Y. S. 323.

to the personality; in the second, in preference to resident creditors; and in the third, in preference to a brother residing in this country, the father of the decedent being a subject and resident of Italy.³⁰

CONSULAR JURISDICTION OVER SEAMEN

Mr. Buchanan, Secretary of State, denied the right of the Austrian Government, under the most-favored-nation clause, to the benefit of stipulations in the treaties between the United States and certain other Powers, conferring upon their respective consuls jurisdiction over disputes between the masters and crews of vessels. In a note to the Austrian chargé d'affaires, May 18, 1846, Mr. Buchanan said:

Seeing that the right now under consideration, where it can be claimed under a treaty wherein it is expressly conferred is, in every such instance, given in exchange for the very same right conferred in terms equally express upon the consuls of the United States, it can not be expected that it will be considered as established by the operation of a general provision which, if it were allowed so to operate, would destroy all reciprocity in this regard, leaving the United States without that equivalent in favor of their consuls, which is the consideration received by them for the grant of this right wherever expressly granted.³¹

In 1866, Attorney-General Speed, on the other hand, advised that the American consul at Honolulu had, by virtue of the most-favored-nation clause in Article X of the treaty between the United States and the Hawaiian Islands, the same jurisdiction of disputes on American merchant vessels between American citizens as was conferred upon French consuls by treaty between the Hawaiian Islands and France.³² The opinion of the Attorney General was adopted by Mr. Seward in his instructions of July 3, 1866, to the American minister-resident at Honolulu.³³ The statement of Mr. Justice Bradley, in writing the opinion

³⁰ As to the right of foreign consuls to exemption from attendance in court as witnesses in virtue of most-favored-nation privileges, see *Baiz v. Malo*, 58 N. Y. S. 806; *United States v. Trumbull*, 48 Fed. 94; *In re Dillon*, 7 Sawy. 561.

³¹ Moore, *Int. Law Digest*, V, 261.

³² 11 Op. Atty. Gen. 508.

³³ Mr. Seward to Mr. McCook, July 3, 1866. Dip. Cor. 1866, II, 488. See opinion of Attorney General Cushing, in 1853, holding that the stipulation for restitution of deserting seamen, in our treaty with Norway and Sweden of July 4, 1827, did not extend to Denmark in virtue of the most-favored-nation clause in respect of naviga-

of the court, in *Dainese v. Hale*,³⁴ that citizens of the United States, by virtue of the treaty of 1862 with the Ottoman Porte, seem to be guaranteed the same right to have their civil controversies decided by their own minister and consuls as enjoyed by subjects of other Christian nations, does not fully meet the issue. The treaty in question provided, in Article I, that all rights, privileges or immunities which the Sublime Porte then granted or might thereafter grant to, or suffer to be enjoyed by, the subjects of any other foreign Power, should be equally granted to and exercised and enjoyed by the citizens of the United States. The rights of extritoriality enjoyed by the subjects of other Powers and sought in this case were, however, based, not upon reciprocal concessions, but upon long usage and custom and the early Capitulations.

PATENTS AND TRADE-MARKS

Of the right of American citizens, under the most-favored-nation clause in our treaty with Japan, to the same protection in trade-marks and patents in Japan, as secured to German subjects by treaty stipulation, Mr. Olney, Secretary of State, in instructions to the American minister to Japan, November 12, 1896, said:

In the Department's judgment, the provision of the treaty of 1854, to which you refer, does not mean if Japan shall grant privileges to Germany in consideration of similar privileges granted by the latter to the former, the same privileges shall be granted gratuitously to the United States. The clause "that these same privileges and advantages shall be granted likewise to the United States and to the citizens thereof, without any consultation or delay," only refers, in my opinion, to privileges granted gratuitously to a third Power and not to privileges granted in consideration of concessions made by another government.³⁵

RIGHT TO HOLD AND DISPOSE OF REAL ESTATE

With respect to the extension to aliens of the right to hold real property, Mr. Bayard, Secretary of State, applying the same rule as in favors or concessions in matters of commerce, said:

This quality of reciprocity, which takes a case out of the category of gratuitousness, belongs, I apprehend, to all our concessions to foreign
tion and commerce, 6 Op. Atty. Gen. 148. See, however, Consular Regulations of
the United States, sec. 78.

³⁴ 91 U. S. 13, 18.

³⁵ Moore, *Int. Law Digest*, V, 315.

states giving their citizens rights to hold real estate in the United States. Such concessions are based on reciprocity. We give the rights to them because they give the right to us. Hence such privileges can not be claimed under "the most-favored-nation" clause by foreign governments to which they are not specially conceded.³⁶

The Supreme Court of Louisiana has held that the clause in Article XXII of the treaty of 1871 with Italy, providing that in "the case of real estate, the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation," entitles Italian subjects to the same exemptions from the payment of the tax imposed on real estate inherited by alien non-resident heirs as enjoyed by subjects and citizens of France under Article VII of the treaty of 1853. The court said:

The heir (a citizen and resident of the Kingdom of Italy) of the deceased is quite as much entitled to the protection of the French treaty, as were the subjects and citizens of France—he having invoked the benefit of the "most-favored-nation" clause in the Italian treaty with the United States.³⁷

RIGHTS OF RESIDENCE

Article VI of the treaty with China of 1868 has been on numerous occasions before the Federal courts for construction. This article reads:

Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation.

It has been held by the Circuit Court, District of California, that a provision in the constitution of the State of California prohibiting the employment by a corporation formed under the laws of the State, in any capacity, of any Chinese or Mongolian, and the Act of the legislature

³⁶ Mr. Bayard, Sec. of State, to Mr. Miller, June 15, 1886. Moore, *Int. Law Digest*, V, 272.

³⁷ Succession of Rixner, 48 La. Ann. 552, 565. See *Frederickson v. State of Louisiana*, 23 How. 445; *Prevost v. Greneaux*, 19 How. 1; *Lee v. Boise Development Co.*, 21 Idaho, 461.

of that State providing for the punishment of violations of this provision, were in conflict with the treaty with China and were therefore void. Mr. Justice Sawyer said:

Any legislation or constitutional provision of the State of California which limits or restricts that right to labor to any extent, or in any manner not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty; and such are the express provisions of the constitution and statute in question.³⁸

An Act of the legislature of Oregon which prohibited the employment of Chinese laborers on street improvements or public works, and at the same time permitted all other aliens so to be employed, was declared by Mr. Justice Deady in the Circuit Court, District of Oregon,³⁹ to be in conflict with the treaty between the United States and China, which, by its most-favored-nation clause, secured to the Chinese residents the same right to be employed and to labor for a living as the subjects of any other nation.⁴⁰ In an earlier case⁴¹ the same judge said:

Article VI of the treaty with China of July 28, 1868, provides that citizens and subjects of the two nations shall respectively enjoy the same privileges, immunities or exemptions in respect to travel or residence within the country of the other as may there be enjoyed by the citizens or subjects of the most favored nation. The right to reside in the country with the same privileges as the subjects of Great Britain or France, implies the right to follow any lawful calling or pursuit which is open to the subjects of these Powers. Therefore, the provisions in the mining regulations of Poorman Creek, which, in effect, forbid Chinamen from working in a mining claim for themselves or others, as well as the clause of the State constitution to the same effect, seem to be in direct conflict with this article of the treaty; and if so, are therefore void.

In declaring a statute of the State of California, prohibiting all aliens incapable of becoming electors of the State from fishing in the waters of the State, to be in contravention of Articles V and VI of the treaty with China, Mr. Justice Sawyer said:

Citizens of other States having no property right which entitles them to fish against the will of the State, *a fortiori* the alien, from whatever

³⁸ *Parrott's Case*, 6 Sawy. 349, 375.

³⁹ *Baker v. City of Portland*, 5 Sawy. 566.

⁴⁰ See also *I. M. Ludington's Sons*, 131 N. Y. S. 550; *People v. Warren*, 34 N. Y. S. 942.

⁴¹ *Chapman v. Toy Long*, 4 Sawy. 28, 36.

country he may come, has none whatever in the waters or the fisheries of the State. Like other privileges he enjoys as an alien by permission of the State, he can only enjoy so much as the State vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the State, therefore, while Germans, Italians, Englishmen and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let or hindrance, is to prevent him from enjoying the same privileges as are "enjoyed by the citizens or subjects of the most favored nation;" and to punish him criminally for fishing in the waters of the State, while all aliens of the Caucasian race are permitted to fish freely in the same waters with immunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions "as are enjoyed by the citizens or subjects of the most favored nation;" and such discriminations are in violation of Articles V and VI of the treaty with China, cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the State may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege, it must permit all others to enjoy, upon like terms, the same privileges whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.⁴²

The Circuit Court, Northern District of California (Sawyer, C. J.), held an ordinance of the city of San Francisco, making it unlawful for any Chinese to locate, reside, or carry on business within the limits of the city and county of San Francisco, except in a certain prescribed district, and requiring all Chinese inhabitants theretofore located outside the prescribed district to remove within a specified time, to be in contravention of our treaty pledge with China.⁴³ Likewise the District Court, Southern District of California (Ross, D. J.), held that a covenant in a deed not to convey or to lease to a Chinaman, being at variance with our treaty with China, was not enforceable in a court of equity of the United States.⁴⁴ Mr. Justice Field, in circuit, in declaring an ordinance of the city of San Francisco arbitrarily prohibiting the conduct

⁴² *In re Ah Chong*, 6 Sawy. 451, 455. See, however, *Leong Mow v. Board of Commissioners*, 185 Fed. 223.

⁴³ *In re Lee Sing* (1890), 43 Fed. 359.

⁴⁴ *Gandolfo v. Hartman* (1892), 49 Fed. 181. See also *Lee v. Boise Development Co.* (1912), 21 Idaho, 461.

of the laundry business within certain sections of the city, to be in conflict with the treaty provisions with China, said:

The petitioner (a subject of the Emperor of China) is an alien, and under the treaty with China is entitled to all the rights, privileges, and immunities of subjects of the most favored nation with which this country has treaty relations. Being a resident here before the passage of the recent Act of Congress, restricting the immigration of subjects of his country, he has, under the pledge of the nation, the right to remain, and follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the State, or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws.⁴⁵

In a report to the President, January 7, 1893, on a bill pending in the Senate for prohibiting for a period of one year, on account of the prevalence of cholera, the admission into the United States of any alien coming, for settlement or permanent residence, from any except American countries, Mr. Foster, Secretary of State, said:

The only pertinence of the "favored-nation" clauses included under the second class, hereinbefore referred to [those securing generally to the citizens or subjects of another country the same privileges of residence and trade as enjoyed by the citizens or subjects of the most favored nation], is that the bill puts no restriction upon immigration from American countries. If immigration from those countries were to be allowed on account of some treaty obligation, or as a favor, it might give occasion for other countries to invoke a favored-nation clause in their treaty. Such absence of restriction, however, with reference to American countries is not in fact based upon either, but depends simply upon the fact that the threatened danger which it is the purpose of the legislation to avert does not exist in this hemisphere. I see no opportunity for invoking a favored-nation clause unless the danger in question equally existed in American countries, and the immigration therefrom in magnitude and other respects should make the case exactly the same with respect to both American and European countries, so that a restriction with respect to one and not the other would have in it no element of reasonable discretion, but plainly be an act of discrimination.⁴⁶

A case quite different arose in 1900 at the time of the threatened epidemic of bubonic plague. The board of health of the city of San Fran-

⁴⁵ *In re Quong Woo* (1882), 13 Fed. 229, 233.

⁴⁶ Moore, *Int. Law Digest*, IV, 153, 157. See, to same effect, *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. 17.

cisco adopted regulations prohibiting any Asiatic person from leaving the city without first submitting to inoculation with a serum supposed to be preventive, but the administration of which to a person who had been exposed to the disease was dangerous to life. The Government of Japan remonstrated against these regulations as in derogation of the rights of travel and residence guaranteed to subjects of Japan in the most-favored-nation clause of Article I of the treaty of 1894.⁴⁷ The Circuit Court, Northern District of California,⁴⁸ held the regulations to be discriminatory and in violation of the constitutional guaranty of the equal protection of the law, without entering into the question of treaty rights. These regulations, said the court,

are directed against the Asiatic race exclusively, and by name. There is no pretense that previous residence, habits, exposure to disease, method of living, or physical condition has anything to do with their classification as subject to the regulations. They are denied the privilege of traveling from one place to another, except upon conditions not enforced against any other class of people.⁴⁹

The decision in each of the cases above noted was based upon the fact of discrimination (the inhibitions of the Constitution being therefore sufficient to cover the case), and did not involve the question whether the favor or concession enjoyed by the subjects of other Powers, but denied to the claimant, was extended to those other Powers gratuitously or in consideration of equivalents. As to what constitutes discrimination against a race, the decisions of the Supreme Court in cases arising under the Fourteenth Amendment to the Constitution afford liberal and not uncertain standards. "The equal protection of the laws is a pledge of the protection of equal laws."⁵⁰

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⁴⁷ *For. Rel.* 1900, 737-757; *Id.* 1901, 375.

⁴⁸ *Wong Wai v. Williamson*, 103 Fed. 1.

⁴⁹ See, for discussion evoked in 1906 by the passage of a resolution by the Board of Education of San Francisco for the segregation of children of Orientals, *Cong. Record*, 59th Cong. 2d Sess. 297, 301, 303, 674, 1231, 1234, 1235, 1236, 1237, 1515, 1522, 1579, 3132; *Proceedings of the American Society of International Law*, April 19-20, 1907, 44, 150, 173, 194, 201, 211, 213.

⁵⁰ Matthews, J., *Yick Wo v. Hopkins*, 118 U. S. 356, 369.

THE NON-LIABILITY OF STATES FOR DAMAGES SUFFERED BY FOREIGNERS IN THE COURSE OF A RIOT, AN INSUR- RECTION, OR A CIVIL WAR *

I. INTRODUCTORY

It is always advisable while laying down any rule whereby human actions are framed, to ascertain the basis on which such principle or rule rests. Such an inquiry is by no means useless in dealing with the science of international law, even though one may regard this branch of knowledge as being merely "positive"; for the conduct of states, just as that of individuals, is generally modelled according to some idea or principle. It will not be unprofitable, therefore, to begin this study with a note, short as it must necessarily be, on the grounds of the liability of states, so that in this manner it may become comparatively easy to ascertain what are the rights of states whose citizens or subjects have suffered damages in the course of riots or insurrections that have taken place in a foreign country.

But any discussion of the subject of the liability of states for the damage thus resulting to foreigners must, for the sake of clearness, be preceded by a precise exposition of the ambiguous conception of sovereignty as well as of the rights of individuals in general. Ordinarily it would not be necessary for this purpose to enter the arena of controversy by attempting to expound the meaning of sovereignty; but if we pass over in silence this notion we may fail to appreciate clearly what is the measure of responsibility that states take upon themselves. And this is not the only reason why this course should be adopted; it will be necessary even if it were only for the purpose of criticising the position held by some writers with regard to the responsibility of states in case of riots, insurrections, or civil commotions.

Sovereignty might be conceived from two different standpoints, neither of which can be defined in a manner absolutely free from doubt.

* A bibliography of authorities cited is printed at the end of the article.—H. A.

The term was introduced into the science of politics by Bodin, whose important book, *De la République*, appeared in 1576. According to him "all the marks of a *sovereign* are contained in this: to have power to give laws to all and every one of his subjects and to receive none from them." He also says that "all the force of law and custom lies in the power of him that have the *sovereignty* in a common realm." This definition was borrowed by Hobbes, and later by Bentham, from whom Austin took his whole theory of the question. Austin sums up the conception by saying that "if a determined human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determined superior is sovereign in the society, and the society including the superior is a society political and independent." According to Austin, therefore, the distinguishing marks of a sovereign are two: one is internal, that is the sovereign must receive habitual obedience from the bulk of the society, and the other is external whereby the sovereign must not be in habitual obedience to any one.

But sovereignty, as an essential characteristic of every state that forms part of the family of nations, has a somewhat different significance. International law is not concerned with the internal organization of states, but considers them as units in themselves without finding out whether they receive habitual obedience from the bulk of the community. Consequently, for the purposes of the law of nations a state is sovereign if it is free from external control. In this case sovereignty is an attribute of the state, while in political science it is an attribute of a person or body within the state. The use of this term (which really belongs to politics) in the science of international law is due to historical considerations. In the middle ages most of the important states were under absolute governments. Their monarchs, who were styled sovereigns in the internal constitutions in accordance with Bodin's theory, were identified with the states which they governed in their foreign relations. The rules of international law were deemed to exist between sovereigns, and when the state came to be considered as distinct from its rulers, sovereignty, with the meaning that we have just explained, was thought to be an attribute of the state.

It would seem from the foregoing remarks that the so-called sovereign

and independent states are, on the one hand, free, at least in theory, to issue within its territories any commands which must be obeyed by the whole community, and on the other, to receive no injunction whatever from outside, thus following internally not less than externally an unrestricted course of action. And logically it would follow that a state may allow foreigners residing within its territories any treatment however harmful it may be to their persons or interests. As a matter of fact, however, the state is restricted effectively in its course of action. No sovereign body could exercise its powers to the detriment of the general good for a considerable period without meeting direct and effective opposition. Nor is a state in any manner entirely free from some kind of control.¹

The followers of the historical school of international law, basing themselves on the absolute conception of sovereignty, assert that the state, being entirely free from external control, the principle of a reciprocal responsibility of nations is contradictory with the notion of independence; that the states are themselves the judges of their responsibility, and that accordingly they are not subject to any legal obligation. But they admit, nevertheless, that states, in order to avoid the continuous struggle that would follow by adopting this principle, relax in practice the exercise of the right of sovereignty; and that in this manner there have been usages established for the reparation of certain wrongs—this relaxation of principle being the only ground for the so-called responsibility of states.²

Undoubtedly the absence of a superior to enforce sanctions in the family of nations has led to this dangerous and misleading doctrine. When the conception of sovereignty was first expounded by political writers it was meant to apply to the superior authority within a community whose power was, in so far as it related to internal affairs, practically absolute. This very same notion has been adopted in international law to sum up the attributes of independence; but it is clear that if states were to follow out the principle to its logical conclusion no peaceful intercourse would be possible among them, and this fact would prevent the formation of an international society. In order to avoid the

¹ See Dicey, *Introduction to the Study of the Law of the Constitution*, pp. 74-81.

² See Funck-Bretano et Sorel, *Précis du droit des gens*, Book I, ch. xii, pp. 224 *et seq.*

necessary evils that would result from such a state of anarchy, nations have been compelled by the force of circumstances, not less than by the recognition of the fact that the organization of the family of nations is decidedly a good thing, to observe rules of justice in their dealings with each other. Out of these considerations has sprung what is called the common consent of states, which, in fact, forms the basis of international law.

States being therefore endowed with a personality, are collective beings or political organisms which, like individuals, are entitled to rights and subject to duties. It is thus that we obtain the so-called state-responsibility, the source and extent of which, in so far as it relates to the indemnification of foreigners for certain damages suffered, will be discussed after dealing with the rights to which individuals as such are entitled.

There are writers on international law who maintain a doctrine that for a time found favor in Italy and France. This doctrine refers to the "*droits individuels*," that is, rights to which all individuals—national and foreigners—are entitled.

It is asserted that the individual as such necessarily enjoys certain privileges which are inherent in him on account of his *personality* and which the law itself does not confer and consequently cannot take away. These rights are *universal* and the individual is entitled to them without reference to the place where he is to be found. Accordingly these so-called rights are international as well as municipal. Fiore, the brilliant and celebrated Italian writer, sums up the matter thus: "Les droits de l'homme, au point de vue international, sont ceux que lui confère sa personnalité au regard de tous les États, de tous ses semblables et de toutes les autres personnes formant la *magna civitas*." According to this writer the violation of one of these rights would justify intervention by all the other states. The individual is invested with them without any express or tacit act of the international community.

A great number of inconveniences and difficulties are opened up by the suggestion that individuals are the subject of rights in international law. Even from the purely theoretical standpoint and without any reference to the law of nations, it is extremely easy to see that the theory is readily assailable. What are these rights? There is no general opinion

as to their number and scope. Is the list of these rights closed? In fact those who maintain the theory in its generality are far from agreeing as to some of its most important essentials.

When the matter is looked at from the point of view of international law it seems as if these writers were attempting to exaggerate the loose dictum of Sir Robert Phillimore that the "true end of international law is the welfare and safety of individuals as members of states." Correct as this statement may be, it is nevertheless wrong to suppose that the law of nations allows, from a scientific point of view, any place to individuals as subjects of rights. This point will be discussed more fully later. Suffice it to say in this connection that if the doctrine of "*droits individuels*" were accepted, the conception of the independence of nations would completely vanish, for a state would hardly have a right to territorial sovereignty.³

From the succinct survey of the exaggerated rights of individuals that has just been made it is easy to conclude that the actual state of things does not allow such a wide interpretation of the responsibility of states, for then their burden would prove to be too great and the state organs would find themselves, if not entirely powerless, at least beset by great difficulties in the performance of other important duties. It is hardly possible to deny that individuals are entitled to certain rights which the state must leave them free to enjoy; but it is also true that by virtue of its sovereignty the exercise of such rights may be restricted. It becomes evident, therefore, that the question of the responsibility of states in so far as it relates to individuals is the result of a compromise between the rights springing from sovereignty and the so-called primordial or absolute rights of individuals.

So far it has been our endeavor to ascertain a very important factor in the liability of states in general. We shall be able now to enquire into the sources of such responsibility, and in doing this we shall incidentally show that the sources of the liability or non-liability in this particular case, just as in any other, are no other than those of the law of nations itself.

The basis for the theory of the liability of states for the damages

³ The whole question is lucidly discussed by Tchernoff, *Protection des nationaux résidant à l'étranger*, pp. 125-50.

suffered by foreigners in the course of riots, insurrections, or civil commotions will not be found in doctrines of private law. There are writers who, in claiming for international law some rule that has not yet been incorporated in the practice of nations, have endeavored to introduce into their science notions which properly belong to the field of private law. In this way they have attempted to find in private law a basis for the theory which they expound. Such a course seems to be in many cases not only unnecessary but misleading. The fundamental difference that exists between private law and international law (the former being law *over* persons, the latter law *between* nations) is sufficient in itself to justify the suggestion that any attempts to take unreservedly certain portions from the one into the other can only be accomplished with great caution, for otherwise they will necessarily lead to confusion of thought.

Thus M. Wiesse, the Peruvian writer, in finding a basis for the assertion that states are responsible to foreigners for the damages caused by the organs of the state in the course of a rebellion, suggests that the obligation is *ex delicto*.⁴ But it is evident that if a state is answerable to foreigners on account of *dolus* or *culpa*, it should also be liable in the same way to nationals. Supposing for a moment that international law imposed such liability in respect of damages suffered by foreign residents, it can never be expected that the same liability would exist towards the national members of the community except by the municipal law of that state. When no such municipal law exists in the state where both foreigners and nationals have been injured, the illogical result would be that the former would be entitled to an indemnity, whereas the latter would have no right whatever, despite the fact that the act or omission that caused the injury is one and the same.

M. Fauchille, following a somewhat similar line, has offered a novel ground for this kind of liability. His idea is to introduce into international law the notion of risk. He argues that just as there is liability under the legislation of some countries, for damages resulting in the performance of certain acts that are attended with risk, so there ought to be in international law a kind of state risk—"risque étatique."⁵ The

⁴ Cited by Von Bar in *Revue de droit international et de législation comparée*, 2e série, Tome I, p. 470. ⁵ *Annuaire de l'Institut de droit international*, Vol. XVIII, p. 234.

objection to this is that the notion would cover a ground wider than that claimed by international law, for nationals as well as foreigners would be subject to the so-called *risque étatique*, and the law of nations does not claim to regulate the conduct of states towards their own subjects.

Nor can the statements made by those who pretend to found this liability on grounds of highly exaggerated humanitarianism be approved. It is said that those persons who migrate to a foreign country carry with them great advantages, and that consequently they ought to be compensated when they are injured by the disturbances in that country. But this is a mistaken view. Von Bar has forcibly pointed out that persons who thus migrate, do so in the pursuit of their own interests.⁶ They seldom, if ever, have in mind the benefit of the country to which they go; and in fact there are many who make great fortunes. Commenting on these cases, Dr. G. Winfield Scott has suggested, with ample reason, that "relying upon their powerful governments to protect them, these foreigners have become concessionaires to fat privileges."⁷ . . . "The European states are prone to overlook the unneutral acts of their subjects abroad and take up their alleged claims with all the force of a powerful state moved by deep national pride. Without doubt the home governments are imposed upon in this matter not only by their erring subjects, but by the resident consular and diplomatic agents."⁸ Pradier-Fodéré has also grasped the true state of affairs. He speaks of the case of those emigrants "who have no taste for hard work and meet with unexpected obstacles. It is the time of murmurs, recriminations, complaints. Diplomatists, the vigilant guardians of the interests of their fellow countrymen, intervene in the conflict. Guided often by political rather than by humanitarian considerations, they entrench themselves behind arbitrary ultimatums."⁹

These persons should not fail to realize that if they expect better returns than those which they can secure in their own countries, they must risk more—the risk of civil commotion should be present in their minds. This view has been expressed by Bismarck and also by the American

⁶ *Annuaire de l'Institut de droit international*, Vol. XVIII, p. 237.

⁷ *Annals of the American Academy of Political and Social Science*, Vol. XXII, No. 1, July, 1903, p. 72.

⁸ *Ibid.*, p. 76.

⁹ Cited by Bureau, *Le Conflit Italo-Colombian (Affaire Cerruti)*, p. 2, note 1.

Department of State when refusing to take in hand the demands of American citizens who deem themselves wronged by the disturbances in the foreign country in which they reside.

It cannot even be argued that foreigners and nationals are on a footing of equality according to the systems of law of the European nations. French law closes certain professions to foreigners. By English law only British subjects are allowed to own shares in British ships. And, moreover, international law does not expect that equal guaranties and opportunities should be offered indiscriminately to foreigners as they are granted to nationals by the local law. It will be unfair, therefore, to claim greater security for foreigners, since by private law they may not be, and as a matter of fact they are not, entitled to any compensation in the cases that form the subject of the present discussion.

This confusion of ideas, if it may be so called, arises owing to the fact that the conception of an *international* obligation is not clearly perceived. It is generally thought that the wrong suffered by the individual is the origin of the liability, and that therefore he has a claim by international law. But a correct apprehension of the notion of international law does not warrant the conclusion that individuals are endowed with an international personality. Only states are subjects of the law of nations; whereas persons, as such, come into the domain of this law merely as objects.¹⁰ It consequently follows that individuals can have neither rights nor duties in international law. The law of nations may impose on a state a certain obligation *in favor* of persons, but it does not follow that these persons are *the subjects* of the rights granted. The state would incur the liability, not because the persons have suffered damages, but merely on account of the fact that it has not issued *internal* regulations in accordance with the international mandate or has not performed them in a satisfactory manner.¹¹ Interna-

¹⁰ Oppenheim, *International Law*, Vol. I, §§ 13, 289, 344, 384.

¹¹ This point is clearly dealt with by Anzilotti who expresses himself in the following manner: "L'obligation imposée à cet égard par le droit international est remplie par la promulgation des règles juridiques assurant aux étrangers la condition voulue et par leur application convenable aux cas qui se présentent. L'Etat n'a pas à garantir les étrangers des torts que d'autres individus peuvent leur faire, ni de dommages qu'ils peuvent éprouver." (*Revue générale de droit international public*, Tome XIII, p. 26.)

tional law imposes on states, for instance, the duty to grant certain immunities to ambassadors; if an ambassador is not duly protected in a state there may arise two entirely different obligations. One is the international obligation of the state for not having performed its duties in a proper manner; the state to which the ambassador belongs has been injured and can claim a reparation. The other obligation is of an internal character and springs from the violation of the municipal law of the state that forbade a certain conduct towards foreign ambassadors. In this case the ambassador himself, as a member of the community, has the right to put the law in motion.

We see from the foregoing argument that in stating that there is an international duty of states towards foreigners for the damages suffered by them in the course of a rebellion or the like, a misconception is committed, even if there were grounds for asserting that some kind of liability exists. We entertain the hope, however, that we shall be able to prove that there is no such responsibility. The rules of international law have their source in the custom and treaties of civilized states, and not in principles of private law or in humanitarian considerations—both being utterly inadequate for regulating the conduct of nations that have no superior.¹² If we were at a loss in finding a principle that would bear out the non-liability of states for the damages suffered by foreigners in the course of internal disturbances, we could easily appeal to the argument by analogy as evidenced in the cases of conflicting rights. It is commonly thought that every act that takes away or violates an acknowledged right would cause an obligation to spring up *ipso facto*. But this absolute theory is not applied universally even in the field of private law. The reason is that there are combinations of circumstances in which the continuance of that right would prevent the exercise of another and still more important right which must necessarily take precedence over the former. *Summum jus, summa injuria*. It can hardly be otherwise, for the life of law is not logic but

¹² It is hardly necessary to point out that dissent may be expressed from the treatment of the subject from this point of view by the school of writers who object to the notion of a "positive" international law, and who prefer to found their theories on principles of abstract justice or natural law. But to follow any other course would be to fall back on the antiquated notion of a law of nature, the interpretation of which is not only difficult but impossible.

experience. For the sake of argument let us suppose that international law enjoins the security of person and property of those residing in foreign countries; that these individuals have suffered damage by the acts or omissions of the state itself in its endeavors to quell an insurrection that has broken out. Under this set of circumstances the very existence of the legitimate authorities of the state is in danger. The security of the inhabitants of the state, it must be remembered, comes only after the security of the state itself.¹³ If the state were under a *prima facie* obligation to grant security to all members of the community, this duty would be done away by the inherent right of self-preservation—a right which subordinates itself to no other. On the ground of a *necessity* so pressing all other rights must be suspended. This doctrine seems to be based on the solid grounds of the practice of nations not less than on principle.

It is not our intention to enter here into the details of the highly controverted question of the existence or non-existence in law of rights springing from necessity.¹⁴ There are some writers, on the one hand, who suggest that there is in every province of the realm of law a notion which, with its irresistible force—that of necessity—may suspend or even completely annul an existing right, however important it may be, thus not only releasing the sanction that imposes the corresponding obligation, but also legalizing the most obvious or manifest violation of a rule of law. This theory counts among its defenders authorities like Gentilis, Grotius, and Vattel, together with a host of modern writers. On the other hand, there are authorities of great repute who strongly object to the notion that would allow the existence of what is called an inexorable force which, when in operation, all rights are suspended, since it is deemed to be superior and paramount. They think that the theory is vague, ambiguous, dangerous; that it would afford ready excuse for arbitrary conduct and all kinds of abuses. It cannot be doubted that the notion, if not properly defined, would easily open the way for a considerable number of difficulties and dangers.

¹³ *Vide Leroy-Beaulieu, L'État moderne et ses fonctions*, p. 98.

¹⁴ *Vide Anzilotti, in Revue générale de droit international public*, Tome XIII, pp. 303 et seq.; Fiore, *Nouveau droit international public*, Pradier-Fodéré's translation, Vol. I, pp. 336 et seq.

While it is true that there is no criterion for deciding in some cases whether conduct is inspired by real or imaginary necessity, it is hardly possible to deny that certain contingencies may arise in which the necessity of the moment is so imperative as to demand prompt action even if it would entail the disregard of certain and well established rights. The law must, and in fact does, make allowances for these cases so pressing and abnormal to which the ordinary rules of law cannot, in justice, be made to apply. It is not hereby suggested that the doctrine of necessity should be left with as wide a scope as some of its adherents would assert, leaving its interpretation to the ingenuity of possible wrong-doers who might apply it to the detriment of the law-abiding members of the community. But it is submitted that the principle on which the doctrine rests is as sound as anything can be. It has often been appealed to in the intercourse of nations, although neither authors nor governments have ever agreed as to its extent and applicability.

During the course of a rebellion against British authorities in Canada, a British commander violated the territory of the United States in his endeavors to catch the *Caroline*, an insurgent vessel. The *Caroline* was seized, set on fire, and sent adrift down the falls of Niagara. Mr. Webster, the American Secretary of State, denounced the attack as an outrage upon the territory of the United States, but he went on to say that in order to excuse such an act, it must be shown that there is "a necessity of self-defence instant, overwhelming, leaving no choice of means and no moment for deliberation." Later on Lord Ashburton, British Minister to the United States, contended that the attack on the *Caroline* was justified by the test that Mr. Webster himself had given.

It is universally accepted as a principle of the law of nations that intervention by a state in the affairs of another—which is nothing less than the violation of the right of independence—is justifiable when it is resorted to for the sake of self-preservation. If international law were to impose an obligation on states in favor of foreigners under normal circumstances, will not the right of self-defence or necessity take away the liability of a state for damage resulting in the course of civil commotions? But to adopt the analogical argument in this case would be to accept the responsibility, at least in principle, and then rebut it in practice by showing that the necessity of the moment forced the

state to disregard the private rights of foreigners. The case can, however, be placed in a more favorable plane, namely, the denial of the existence of any liability.

Certain considerations springing from the fact of the existence of the state—whether it be considered as an end in itself, or as a means to an end—would suggest clearly the intrinsic *impossibility* of allowing any presumption of liability. However narrow a view of the purposes for which modern states are formed may be adopted, it must be admitted that it is their duty to establish the security of person and property. International law naturally assumes this, and as it deals with the intercourse that exists between nations it imposes the obligation on every state to provide adequate punishment and inflict it indiscriminately whenever a person does acts injurious to the government or subjects of another state. For if a nation regards with impunity such offensive actions of its members, it contributes thereby to endanger the good harmony that should prevail in international relations, becoming a moral accomplice to the original offence, and is held, therefore, personally liable. This principle, though essential in its generality for the very existence of the family of nations, is not absolute in its application. It is evident that there are reservations inherent in the very nature of things, and, although of great importance, they must be considered only as exceptions. Contingencies may arise which the most prudent legislation cannot foresee, or the most powerful and well constituted government prevent. In such cases the nation whose members have suffered can demand from the local sovereign no more than the reparation, if any, that the municipal law provides in such cases according to ordinary rules of justice, impartiality, and good faith. But this could not be an *indemnity*; it must be regarded as a *bounty* which equitable considerations may prompt a government to offer, and which could not in any manner give rise to a legal obligation.

The moment that the constituted authorities of the government cease to exist, the state itself, as contemplated by international law, is non-existent, and could not, therefore, enforce those measures of public welfare for which it was formed. In the case of a rebellion or civil war the first and most important interests of the state—its existence or that of its constitutional organs—are at stake, so that it be-

comes imperatively necessary for it to do its best in the avoidance of such commotions. Under these circumstances, it is evident, the state might find it *impossible* to insure the safety of persons and property within its territory. Strong measures may be called for in the carrying out of which private interests may be disregarded and consequently injured. The danger might be so imminent that it may demand exclusively all the attention of the government. The state cannot then enforce the ordinary law and should not, therefore, be held liable for the damages that result. Thus the well known maxim *nemo tenetur ad impossibile* applies.

It further appears that, granting the existence of the above set of circumstances, it would not be possible to allow the supposition to be entertained that damages have resulted owing to carelessness. For how can a state be thought to be negligent as to a matter that vitally affects its existence? Moreover—and this will apply to cases in which the existence of the constituted authorities is not so deeply involved in the prevention of injurious acts, and damages accrue to foreigners either on account of measures taken by the state in the recovery of its authority, or through acts done by the rebels—it will not be possible, owing to the complicated nature of the case, to obtain proof of the carelessness of the government. The most honest and obliging state will not always be willing to grant to individuals or foreign nations the right to inquire into its acts in order to ascertain when some of its officials have been negligent in the performance of their duties. Public policy naturally prevents such a course. The state is the sole judge of its internal acts. International law cannot demand of a state to permit an investigation of this nature. To do so would be to infringe in a serious manner the accepted principle of the independence of sovereign nations.

The arguments that have just been advanced, together with the unfairness that would result by placing foreigners in a more favorable condition than nationals, would seem to bear out, in principle at least, the reasonableness of refusing to saddle the state with such liability. Let us now examine in turn the opinion of writers, the practice of nations, and the treaties that exist with reference to this matter. It will then be possible to see how far the law is in accordance with the principle.

OPINIONS OF WRITERS

The majority of writers on international law maintain that there is no liability on the part of the state to grant an indemnity to foreigners in the cases that form the subject of the present discussion. There is an eminent writer who dissents from this view,¹⁵ but it is difficult to see why he adopts this course. In fact his statements in this connection seem to be too absolute and, it will appear, devoid of legal foundation. The recognition of any kind of liability, as Calvo points out, would necessarily involve a threefold danger. It would favor especially powerful nations to the detriment of weak states. It would also constitute an unjustifiable privilege for the foreign members of the community since nationals could not, except by municipal law, claim the privilege. Finally the mere fact of questions of this nature being withdrawn from the cognizance of the ordinary courts would amount to a serious interference with the authority and dignity of the jurisdiction of the local sovereign.¹⁶

The question has also attracted the attention of the Institute of International Law. Although absolute liability on the part of states was not recognized, nevertheless the members of this learned body thought that a certain amount of responsibility ought to exist. The conclusions arrived at by the Institute are intended to recognize a right to indemnity as due to foreigners if they have been injured in their person and property when (a) the act that causes the damage is directed against foreigners as such, or as members of a given state; (b) the violence consists in the closing of a port to ingress or egress, without due notice; or (c) the act is illegal or contrary to the laws of war. But if the state has been recognized as belligerent by the country to which the complainant belongs his claim may be set aside. Foreigners will likewise find their claims

¹⁵ Rivier, *Principes du Droit des Gens*, Vol. II, p. 43.

¹⁶ His actual words are as follows: "Admettre dans l'espèce la responsabilité des gouvernements, c'est-à-dire le principe d'une indemnité, ce serait créer un privilège exorbitant et funeste, essentiellement favorable aux États puissants et nuisible aux nations plus faibles, établir une inégalité injustifiable entre les nationaux et les étrangers. D'un autre côté, en sanctionnant la doctrine que nous combattions, on porterait, quoique indirectement, une profonde atteinte à un des éléments constitutifs de l'indépendance des nations, celui de la juridiction territoriale." (Calvo, *Le Droit international théorique et pratique*, Vol. III, § 1280.)

barred if they have continued to maintain their domicile or habitation in the territory of the insurrectionary government, as well as when they themselves have provoked the injury.¹⁷

Bluntschli¹⁸ expresses himself with emphasis and precision when he lays down the law to the effect that "states are not bound to allow indemnities for losses or injuries suffered by aliens or nationals resulting from internal troubles or civil war."

Fiore handles the question with his customary cogency. While considering the damage caused by the government itself in order to repress the disorder brought about by a revolutionary movement or civil war, he lays it down that the authorities may employ the means of repression requisite to safeguard the interest of the state and which are not forbidden by international law. "If by this act foreigners suffer an injury, the government cannot be declared responsible, nor be held to make indemnity for the damages suffered by them." He further adds that if the government did not take the necessary measures for protecting the property of foreigners or did not endeavor to put down the offensive violence of its citizens, it would be answerable for the consequences of its culpable negligence; "but if the injury results from *force majeure*, there would exist no legal responsibility," for it is evident that "the action of a government could not be paralyzed by the necessity of protecting the rights of foreigners."¹⁹

Pradier-Fodéré evidently adopts the same reasoning as Calvo. He points out that the rule generally accepted whereby states are not bound to grant an indemnity to foreigners on account of damages suffered during a civil war is based on considerations of great importance, which he summarizes in the following manner: "All foreigners who go to a foreign country for the advancement of their private affairs submit themselves, by this very fact, to the same laws and to the same tribunals as the citizens of that country, and the government cannot be made answerable towards them for the consequences of an outbreak or of a civil war, without making such responsibility an unjustifiable inequality between foreigners and nationals. All sovereign states have

¹⁷ *Annuaire*, Vol. XVIII, p. 253 *et seq.*

¹⁸ *Le Droit international Codifié*, par. 380 bis.

¹⁹ Cited by Moore, *Digest of International Law*, Vol. VI, p. 952.

the right, in fact, of compelling obedience to the established order in their territories, even by the use of arms, and they will incur no other obligation to foreigners for the damages caused by the use of force than they incur in respect of their own nationals. To demand anything more would amount to an infringement on the territorial jurisdiction of the sovereign; it would introduce into international relations a privilege as favorable to powerful nations as it would be prejudicial to weak states.”²⁰

Considerations as those adduced by Calvo and Pradier-Fodéré cannot be easily overlooked. They go to the very foundation of statehood and their disregard would seriously impair the independence of nations, thus imperiling the existence of an international community. It must always be borne in mind that international law derives its binding force not from the injunctions of a superior but from the *consensus* of sovereign entities. Any of its rules, therefore, must be in accordance with the principle of independence, and must not substantially oppose or infringe the theories of sovereignty and equality.

There is an eminent writer who, in dealing with the laws of war, lays down the rule with much precision and force. According to this authority “foreign subjects living or owning property in a country in which civil war breaks out cannot complain to their governments for the damages sustained on account of military operations. They cannot complain, at least so long as the troops act in accordance with the usages of war.”²¹

After what has been said there ought to be no difficulty in adopting the statements of Professor Oppenheim in this connection as embodying the accepted view. “The majority of writers maintain, correctly, I think,” says he, “that the responsibility of states does not involve the duty to repair the losses which foreign subjects have sustained through the acts of insurgents and rioters. * * * The responsibility of a state for acts of private persons injurious to foreign subjects reaches only so far that its courts must be accessible to the latter for the purpose of claiming damages from the offenders, and must punish such of those acts as are criminal.”²²

²⁰ *Traité de droit international public Européen et Américain*, Tome 1, pp. 348-349.

²¹ Pillet, *Les Lois actuelles de la guerre*, p. 29. ²² *International Law*, Vol. I, p. 223.

"The law of nations," says Rutherford, "does not suppose that a civil society must necessarily be a principal or an accessory in every act, which is done by any of its members. For this law, whilst it considers the several members as parts of the collective body, does not suppose each member to have no will of his own, or to be incapable of acting for himself without the command or the consent of that body." * * * "The neglect of a nation, in not preventing the subjects of it from offending, will make the nation a party in their offence: for the nation, since they are under its jurisdiction, is obliged to take care that they do no harm to the rest of mankind. *But such neglect does not make a nation accessory to the acts of subjects, that are in a state of rebellion* and have renounced their allegiance, or that are not within its territories; for in these circumstances, the subjects, whatever they may be of right, are not within its jurisdiction in fact."²³

In thus upholding this principle of the law of nations, most writers point out that the reason for the non-liability of states is that the acts that cause the damage are impossible of prevention. They are due to *force majeure* and therefore no liability can take place under the circumstances.

M. Brusa²⁴ takes exception to the doctrine of *force majeure* in the present case. His argument seems to be that the acts which cause the losses or injuries proceed from volition. According to him the notion applies only to acts emanating from the blind, elementary forces of nature, that is to say, to the "will of God." It is hardly likely that this view will be accepted. It must be recognized that the most efficient government might see itself incapacitated from foreseeing or preventing unfortunate occurrences. Certain civil commotions, like pestilences,

²³ *Institutes of Natural Law*, Vol. II, ch. ix, pp. 492-493.

²⁴ *Annuaire de l'Institut de droit international*, Vol. XVII, p. 96. M. Gaston de Leval (Report of the 24th Conference of the International Law Association, p. 206) thinks that "riots cannot, as a rule, be called *actes de force majeure*." Apparently he tries to explain his statement by saying that riots "are not generally provoked by an unknown cause, and the duty of every government is to prevent them." This limitation of the meaning of the phrase "*actes de force majeure*" would seem to be too absolute. Pestilences are effects of known causes and every government considers itself bound to prevent them. But at the same time all admit that they are acts of *force majeure* because there are times when it is impossible to prevent such evils.

cannot be put down by the state without regrettable happenings taking place. They are beyond the plane of reasonable care, and when they arise the government, in virtue of its right of eminent domain, is empowered to resort to any measures that the necessity of the moment may call for, provided they do not conflict with ordinary principles of humanity, even though they may inflict damages or suspend the ordinary rights of the members of the community. "Foreigners," Professor Westlake says, "must even be content to submit, in common with nationals but not by way of discrimination from them, to those measures beyond the ordinary course of law or administration which the government may find it necessary to adopt for the suppression of the insurrection, so long as they do not conflict with humanity or with substantial justice."²⁵

CASES ARISING BETWEEN THE MORE IMPORTANT NATIONS

The next topic that we have to discuss refers to the actual state of the law, especially as it applies to the leading states. This inquiry will lead us to a conclusion that cannot possibly be rebutted, for, after all, the practice of states is the more important source of the law of nations. By doing this we shall also be able to ascertain whether the principles that have been enunciated are in accordance with the practice.

The question was raised by the British Government on account of damages sustained by British subjects during the course of the revolutionary movements that took place in 1849 and 1850 at Naples and Tus-

²⁵ *International Law*, Vol. I, p. 330. Among the authors that deny the existence of any liability on the part of the state for damages sustained by foreigners in the course of a rebellion the following may be mentioned:

Anzilotti, *La responsabilité internationale des États à raison des dommages soufferts par des étrangers* in *Revue générale de droit international public*, Vol. XIII, p. 305; Bonfils, *Manuel de droit international public*, Sec. 326; Calvo, *op. cit.*, Vol. III, 1280 *et seq.*, also in *Revue de droit international et de législation comparée*, Tome I, p. 417; Hall, *International Law*, p. 219; Lawrence, *Commentaire sur les éléments du droit international de Henry Wheaton*, Vol. III, p. 135; Leval, *De la protection diplomatique des nationaux à l'étranger*, 103; Olivart, *Del reconocimiento de beligerancia*, p. 108; Phillimore, *Commentaries upon International Law*, Vol. I, 318; Pittard, *La protection des nationaux à l'étranger*, pp. 281-6; Seijas, *El derecho internacional hispano-americano*, Vol. I, pp. 50 *et seq.*, Vol. II, pp. 7, 308, Vol. III, pp. 308 *et seq.*, Vol. IV, pp. 507-11; Torres Caicedo, *Mis ideas y mis principios*; Wiesse, *Reglas de derecho internacional aplicables à las guerras civiles*, 43-45.

eany, and which were ultimately frustrated by the intervention of Austria.

The British Minister at Florence was instructed to present to the Grand Duke of Tuscany a demand for indemnity. An English fleet was also sent to Naples to force on the King of the Two Sicilies a similar reclamation for the losses suffered by Englishmen during the bombardment of Messina. The Grand Duke asked the aid of Austria and further requested the court of Russia to serve as mediator. Russia declined to acknowledge the principle on which the British claim was based, and for this reason refused to take up the arbitration. Nevertheless, the Russian Minister of Foreign Affairs, Count Nesselrode, addressed a note to the Cabinet of London. "According to the rules of public law," said the dispatch, "as they are understood by Russian policy, it cannot be admitted that a sovereign forced to repossess himself of a town occupied by insurgents, is bound to indemnify foreign subjects who may have suffered damage from the assault on such a town." He went on to say that:

If the right which the English Government claims in Tuscany and Naples should prevail, it would result in giving to British subjects an exceptional position abroad, far beyond the advantages enjoyed by the inhabitants of other countries, and would create for the governments which welcome them an intolerable situation. Their presence would be, to the fomenters of trouble, an encouragement to revolt; for, if behind the revolutionary barricades, there should continually rise up the menacing eventuality of future reclamations in favor of English injured in their property by the act of repression, every sovereign whose position or whose relative weakness exposed him to the coercive measures of an English fleet, would find himself stricken with helplessness in the face of insurrection.

Prince Schwartzenberg expressed the views of Austria as follows:

However disposed may be the peoples of Europe to extend the limits of the right of hospitality, they will never do so to the point of giving to foreigners a treatment more favorable than the laws of the country assure to nationals. The first right of every independent nation is to assure its own preservation by all the means in its power. When a sovereign using this right is obliged to resort to arms for the suppression of an open revolt, if, in the civil war which results from it, the property of foreigners established in the country is injured, it is a public misfortune which foreigners must share with nationals, and which no more gives

them the right to an exceptional indemnity than if their reclamation was founded on any other calamity proceeding from the will of men.^{25a}

It appears that Calvo is wrong in asserting that the Austrian and Russian notes "brought an end to the claims of England who renounced her reclamations,"²⁶ because in the course of a debate in the House of Commons, June 28, 1850, that is nearly two months after the Austrian and Russian dispatches had been received, Lord John Russell said that the Neapolitan Minister of Foreign Affairs had stated that he was willing to agree "that compensation should be awarded for the loss of such property as was destroyed without sufficient necessity, whether wantonly, designedly, or by pillage."²⁷ In spite of this fact, and although in the opinion of Lord Palmerston these dispatches were "an argument and nothing more,"²⁸ it is not to be supposed that the reasons there advanced lack logical force. The principle then enunciated has been regarded by nearly all the authorities on international law as containing the rules applicable to such cases.

In 1836 Belgium was considering the advisability of conferring a right of indemnity to *natives* for the damages that they had suffered during the revolution of 1830. Lord Palmerston then expressed the view that "as long as the Belgian Government took no steps to indemnify its own subjects for similar losses, His Majesty's Government did not feel justified in pressing for a decision in favor of British subjects, *who could only be entitled to be placed on the same footing as Belgian subjects.*"²⁹

The United States applied the same principle when Spain attempted to obtain compensation for the losses sustained by some Spaniards at the hands of a riotous mob at New Orleans in 1851. In consequence of the news brought to that city of the execution in Cuba of some of the members of the Lopez filibustering expeditions, the populace rose against the Spanish residents and destroyed some of their property. Mr. Webster, Secretary of State, in a note to Señor Calderón de la Barca, the Spanish Minister, refused to admit any liability on the part of the United States for the violence committed by the mob.³⁰

^{25a} Moore, *Digest of International Law*, Vol. VI, pp. 886-887, citing Lawrence, *Commentaire sur Wheaton*, III, 128. ²⁶ *Op. cit.*, Vol. III, p. 145.

²⁷ Hansard's *Parliamentary Debates*, 3d series, Vol. CXII, pp. 701-2.

²⁸ *Ibid.*, Vol. CXI, p. 719. ²⁹ Cited by Baty, *International Law*, pp. 97-8.

³⁰ Moore, *Digest of International Law*, Vol. VI, p. 812.

In the year 1863 the same parties were again engaged in a similar controversy. On this occasion it was a claim presented to Spain by the United States for the losses sustained by one of their citizens by an insurrection in Santo Domingo directed against the Spanish Government. As was to be expected, His Catholic Majesty repudiated all responsibility, alleging that every possible measure had been taken for the protection of foreigners, that in spite of this the government troops had been obliged by the insurgents to abandon certain positions, and that he could not under the circumstances, be held liable for the damages caused by the insurgents. The United States, it appears, acquiesced in this decision.³¹

The United States have always refused to entertain any demands directed against them for damage suffered there by foreigners in the course of riots or civil war. This policy they followed and upheld when the Peruvian Government requested compensation for a cargo of guano that had been destroyed by a party of men belonging to the Confederate navy. In a dispatch of January 9, 1863, Mr. Webster denied the existence of any liability on the part of the United States, as they had, he said, employed all the diligence and energy that could be exercised for the purpose of suppressing the insurrection.³²

By the time of the American civil war the British Government was prepared to uphold this principle of justice. The Cabinet of London refused then to take in hand demands for indemnity on account of injuries inflicted by the forces of the United States on British subjects. The claimants were informed that their course was to make use of such remedies as were open to the citizens of the United States.³³

During the Cretan outbreak of 1868 Turkey attempted to obtain satisfaction for the acts of violence committed on Ottoman subjects. The Greek Minister of Foreign Affairs refused to entertain the claim. Finally, the conference that met in Paris in 1869 decided to leave all these questions to the cognizance of the local tribunals.³⁴

Another precedent is furnished by the disturbances that took place

³¹ Moore, *Digest of International Law*, Vol. VI, p. 955.

³² Moore, *International Arbitrations*, Vol. II, p. 1622.

³³ See Hall, *International Law*, p. 220.

³⁴ Cited by Baty, *International Law*, p. 151.

at Saida in 1881. They seem to have been so harmful that out of the thousands of Spaniards (so says the Duke de Fernán Nuñes, Spanish Ambassador at Paris) established in that region, there only was left "desolation, death, dishonor, and misery." The Spanish Government demanded "an indemnity" from the French Government "as an act of justice," and submitted that energetic measures should be taken in order to prevent further occurrences of this regrettable kind. M. Barthélemy Saint-Hilaire delicately but forcibly reminded the Government of His Catholic Majesty that Spain had always refused to accept any responsibility for the wrongs inflicted on foreigners during the Carlist insurrections, and that the Government of the Republic, being naturally entitled to entrench itself behind this very same rule of international law that Spain had effectively cited whenever claims of this nature had been made against her, would not be obliged to indemnify the victims of Saida. He went on, nevertheless, to say that the French Government would grant some help to those who had suffered, but not in the form of an indemnity, for, he explained, "these measures of reparation cannot, in their very nature, emanate from a legal obligation. * * * The occurrences at Saida, like the coming of a pestilence, bear the character of the inevitable, and cannot impose liability on a state."³⁵

It is a misfortune, however, to find that these recognized principles, founded both on ideas of justice and expediency, and universally acted upon in the practice of the more important nations in their dealings with one another, have barely, if ever, been applied by these very nations in their intercourse with the weaker members of the international community, when their citizens or subjects have suffered damages in the course of regrettable but unavoidable occurrences brought about by insurrections or internal commotions. It is true that some of the Latin American republics see themselves often harassed by rebellions, but there is no reason for powerful states to deal with them by arbitrary means that the law of nations does not warrant, and thus compel them to grant reparation—often excessive—to foreigners.³⁶

³⁵ Cited by Sejas, *El derecho internacional hispano-americano*, Vol. III, pp. 445 *et seq.*

³⁶ M. Thiers is reported to have said in the Chamber that although the French claim for compensation for damages suffered by Frenchmen against a Latin American

CASES IN WHICH DEMANDS HAVE BEEN MADE AGAINST THE LATIN AMERICAN REPUBLICS

We have now gone over some of the cases in which a demand for compensation has been raised by a state as against one of the more powerful nations. What have been the results, the character, and the consequences of similar demands when the claims for damages come from one of the more important states as against the Latin American republics? In order to answer this question it is necessary to examine some of the cases that have occurred in the New World. If we attempt to summarize here one of the conclusions to which the examination of the actual cases will lead us, it must be said that grants have often been made to those foreigners who are able to arouse the pride of their countries and thus move them with a mistaken and excessive zeal to press, in the first instance, diplomatic claims, and then, if there is a demur, to back them with the use of arms, actual or prospective. Compensation is then obtained not by the force of law but by the law of force. For these reasons the Latin American states have always refused to recognize the legal obligation to grant an indemnity. And when reparations have been voted, these states have insisted that they are in no way bound to do so by law, and that therefore any such grant is to be considered as a liberality or *bounty* and not as an *indemnity*.

It is hardly necessary to mention the compulsory measures taken against the United Provinces of the River Plate by Great Britain and France, and against Mexico by Great Britain, France, and Spain. The facts in both cases are well known, for everybody is aware that the ostensible purpose of these expeditions was to obtain reparation for the damages sustained by foreigners in the course of revolutions. It is now universally admitted that both these interventions were unjustifiable, even on the grounds on which they were alleged to have been undertaken. For these reasons we confine ourselves to mention the cases only, without proceeding to add further condemnation, although well deserved, of the high-handed action of these powerful nations.³⁷

During the revolution that took place in Venezuela in the year 1859 state had been reduced to three millions—the sum actually obtained—yet it had been found that the claimants had only a right to two millions! (*Sejas, op. cit.*)

³⁷ See Calvo, *op. cit.*, Vol. I, §§ 187-203.

several Spanish subjects suffered heavy damages caused both by the constituted government and by the rebels. The Venezuelan Minister of Foreign Affairs gave his answer in a brilliant dispatch in which the principles of the law of nations were invoked with great precision and force. He expressed the readiness of his government to pay the losses caused by the legitimate authorities. But with regard to the acts of the rebels he refused to recognize that Venezuela was answerable; her only duty, he said, was to punish those who had caused the injuries. As this answer did not satisfy the unjust demands of Spain, the diplomatic relations of the two countries were broken off. Finally Spain seems to have seen the justice of the Venezuelan refusal by agreeing to the principle that was set up, for by a convention of November 16, 1861, the friendly relations of the two countries were reestablished and Spain agreed that Venezuela should pay in respect of the damage caused by the authorities only, or when such damage was due to the negligence of the officials of the government.³⁸

In 1836 some Venezuelan revolutionists—the so-called *reformistas*—took possession at Puerto Cabello of a quantity of flour belonging to a Mr. Litchfield, an American citizen. The Government at Washington demanded compensation from Venezuela, but she refused to entertain the claim on the ground of *force majeure*. The United States thereupon dropped the matter.³⁹

After the riot at Panama of April 15, 1856, which was the result of a quarrel between a native and an American citizen, the Government of New Granada contended that she was not bound by the law of nations to indemnify those who had suffered damage. The United States pressed unduly an exorbitant claim in order to obtain great advantages from this weak state. Eventually, by a convention of September 10, 1857, New Granada acknowledged her liability, "arising out of her privilege and obligation to preserve peace and good order along the transit route," an acknowledgment which was understood to refer to the engagement of Article 35 of the treaty of 1846 between the two countries.⁴⁰

³⁸ Torres Caicedo, *Mis ideas y mis principios*, Vol. II, p. 315.

³⁹ *Ibid.*, p. 314.

⁴⁰ *British and Foreign State Papers*, Vol. 47, p. 353. A full discussion of the case is found in Seijas, *op. cit.*, and also in Moore, *International Arbitrations*, Vol. II, p. 1361 *et seq.*

In the year 1871 several foreign subjects suffered damages in Argentina owing to the acts of tumultuous gauchos. The diplomatic agents made representations to the government complaining of the lack of security attending foreign immigrants. The British Chargé d'Affaires was told by the Argentine Minister for Foreign Affairs that if a diplomatic agent in any way censured the action of the government with regard to the defence of the frontier or the administration of the foreign colonies he (the Minister) would be placed under the painful obligation of leaving his dispatches unanswered, or of answering them in a way that would unequivocally deny the right to interfere in such matters. Señor Tejedor in a very able and lucid dispatch of January 22, 1872, further expressed his views to the British Chargé d'Affaires as to the position of foreign residents in similar cases. "Foreigners," says the note, "so soon as they arrive in a foreign country, are subject to its laws and to its authorities. A foreigner, consequently, with a view to the exercise of his rights, as well as for the setting forth of his complaints, must address himself in common with those who are citizens of the country to these authorities, invoke these laws, and await and submit himself to their decisions. Otherwise the foreign body would constitute a state within a state—a political monstrosity." Earl Granville in his note of March 26, 1872, to the British Chargé d'Affaires at Buenos Aires, instructed him to the effect that, if he found on careful inquiry that there had been default on the part of the local authorities, a representation should be made to the Argentine Government, and then proceed to demand proper compensation for the injury inflicted. "Should no such default appear," he continued, "calamitous as this result of the rising has been to British subjects, Her Majesty's Government regret that they cannot properly put forward a claim in their behalf."⁴¹

In consequence of the political disturbances that occurred at San Miguel some Italian residents lost part of their property. Italy at once instituted a claim against the Government of Salvador. The Republic flatly denied the existence of any liability in accordance with the principles of international law. Nevertheless, by a convention of February 4, 1876, she "considers those occurrences as a public calamity

⁴¹ *Parliamentary Papers*, 1872 (c. 569).

and, without establishing precedents, agrees to recognize and pay the losses suffered by the Italian subjects.”⁴²

In 1881 some Mexicans were murdered by a lawless band of American citizens. The Mexican Government did not claim compensation, but limited itself to demanding an investigation of the matter so that the perpetrators of the crime should be properly punished.⁴³

As a further example of the interpretation of this principle by the Latin American states let us read the opinion of the Minister of Justice of Brazil as expressed in a note to the Minister of Marine, dated October 9, 1893. “In times of internal troubles or civil war,” thus runs the dispatch of M. Fernand Lobo, “the government does not assume any responsibility or violate the rights of individuals if, being constrained by *force majeure*, and in the legal exercise of public powers, it assures the security of the state or commits acts that cause damages to individuals. Those who have suffered, let them be nationals or foreigners, have no right to any indemnity whatever.”⁴⁴

This was the time of the civil war in Brazil. Her Minister of Justice did nothing but point out the recognized rule of international law, as may be seen from the following passage, taken from a communication of the American Department of State in answer to a demand of an American citizen who sought the interference of the United States in order to make good a claim against the Brazilian Government for the destruction of his property during the civil war. The Department of State declined to take in hand this claim and added:

An alien domiciled in a foreign country is not entitled to any greater privileges or immunities than a native. If war breaks out there, he, in common with the other inhabitants of the country, is necessarily exposed to the inconveniences and disadvantages of such a state of things, and, if his property is injured or destroyed, the government cannot legally be held accountable therefor.⁴⁵

⁴² *British and Foreign State Papers*, Vol. 70, p. 493.

⁴³ *Correspondencia diplomática de México*, Tomo II, p. 163.

⁴⁴ See *Revue générale de droit international public*, Vol. I, p. 164. In 1895, however, the Brazilian Government granted the sum of 900,000 francs to the families of three French citizens who had been killed during the civil troubles of 1893. (See the same review, Vol. II, p. 340).

⁴⁵ Moore, *Digest of International Law*, Vol. VI, p. 892.

Sometimes claims of this nature have led to international conflicts that for a moment have seriously threatened the peaceful relations existing between two countries. It was the confiscation directed by the administrative decision of the local authority against Cerruti, an Italian subject, that caused the rupture between Colombia and Italy. It appears that Cerruti was carrying on business in Colombia in a company that mainly belonged to politicians of note. He himself, it was alleged, had taken active part in the political movements that led to the insurrection. The local authority decreed confiscation of the property of the company as being obnoxious to the government, rightly assuming that it was a Colombian association. Italy soon intervened, and for a time diplomacy was doing its work of peace, until an extraordinary incident rendered an arrangement impossible. An Italian cruiser arrived in Buenaventura for the purpose of obtaining information with regard to the points at issue. The commander of the vessel called Cerruti on board, whereupon the local authorities informed him that Cerruti had been forbidden to leave the town. Finally permission was given after the commander had promised to send back the prisoner in order that the latter might remain amenable to the local jurisdiction. But the commander evidently thought otherwise for he decided to resist by force, in spite of his pledge, the removal of the prisoner. As a result of these high-handed proceedings the diplomatic relations of the two countries were broken off. The parties finally agreed to refer the dispute to arbitration first to Spain and then to the United States, and in the end Colombia was obliged to pay the losses caused to the property of Cerruti.⁴⁶

It has nowhere been suggested that in these weak states of the New World foreigners experience a less favorable treatment than that accorded to nationals. When the treatment is different it is rather more advantageous to aliens owing to the hospitable character of these nations. They have always entertained the best good-will for alien residents. Opportunities and guarantees that are offered to nationals are

⁴⁶ Bureau, *Affaire Cerruti*. Professor Bureau quite rightly says that "the Cerruti case was a new episode to be added to the history—already too long and too well known—of the abuses of force of which European states have sometimes been guilty towards the Republics of Central and South America." (*Ibid.*, p. 2.)

likewise extended to foreigners. If we examine some of the provisions of the laws of the Latin American republics we shall find that their governments, in spite of the severe treatment that they experience at the hands of the more powerful states, have always treated foreigners with all the consideration and liberality that are possible under circumstances so abnormal as those brought about by such public calamities as civil commotions. Thus we find that during the civil war in Venezuela of 1862, the Secretary of Foreign Affairs addressed a circular to the governors of the provinces intimating the order of the president that aliens should be respected in their persons and property.

The same government by decree of February 14, 1873, undertook to pay for the losses, injuries, or expropriations caused by the authorities in the event of civil or international war. By Article 11 of this decree it is provided that all those who without a public character exact forced loans, contributions or spoliations are to be personally liable to those who have been wronged.

The Government of Peru, by a decree dated February 27, 1871, decided to pay the claims for the damages caused in the sacking of Callao in November, 1865, by the revolutionary forces of Colonel Prado. The awards were to be made by a mixed commission appointed by the diplomatic corps resident in Lima and the Peruvian Minister of Foreign Affairs.

Colombia, by her law No. 67 of 1877, provided that the losses caused by the rebellion of 1866 should be satisfied with funds of the state. Foreigners as well as nationals were entitled to this liberality; but it was further decided that foreigners should receive payment in the form of drafts on the custom houses. The British Foreign Office protested against this provision in a dispatch addressed to the Colombian Government on January 3, 1878. Possibly in consequence of this objection a new law was passed on the 1st of July, 1878, providing that the claims of foreigners should be settled ministerially (*administrativamente*) and that the claims thus recognized should be paid in cash or in documents of public credit, as may be agreed upon between the executive power and the party interested. In this incident we find an example of the unjustifiable pressure that sometimes is brought to bear by the powerful states on the Central and South American republics. Colombia was

making to foreigners a concession which she was not by law obliged to do. In spite of this spontaneous act of grace Great Britain pretended to dictate the manner in which the bounty should be given.⁴⁷

Again by law of August 31, 1886, Colombia took upon herself the payment of the damages sustained by foreigners during the rebellion, provided that the losses were caused by the acts of the public authorities. The executive decree that put this law into execution (October 11, 1886) went on to say that "though international law does not bind the government to indemnify foreigners for the losses and damages suffered, yet it has decided of its own free will to repair such damages. But the present course shall not hereafter be cited as a precedent for future action."⁴⁸

We may now leave here the record of these unwarranted and untenable claims on the part of the powerful nations which seem to have availed themselves of every possible opportunity for reminding the Spanish American republics, in a manner sometimes too harsh and often undeserved, that, in their opinion, the latter's stability as regards internal affairs and general condition of the government does not quite reach the standard that is expected from properly constituted governments. The consideration of questions like this would afford ample matter for thinking to the international lawyer. He might feel tempted to doubt whether international law is really law or, if so, whether there are different categories of states when considered from the standpoint of legal theory. And then he might proceed to ask himself what is the principle that underlies this supposed differentiation, if it exists, among the members of the family of nations. Does the differentiation depend on a certain standard of general advancement that would enable a given country to provide fair and just enactments for the welfare of the community, or is it, on the other hand, to be found in the ability or power of backing, by means of force, the rules that are deemed to exist for the intercourse of nations whenever one of such rules has been disregarded to the prejudice of that state? For in the history of these claims it clearly appears that reparation has been exacted in a manner that would not be adopted with greater states. And if the proceedings thus followed are

⁴⁷ *British and Foreign State Papers*, Vol. 68, p. 776; Vol. 69, p. 376.

⁴⁸ *Ibid.*, Vol. 77, pp. 807, *et seq.*

in any way correct, then they involve the supposition that one set of rules obtain among certain states while entirely different rules apply to the other members of the international community. In fact, one argument at least would be found here which is contradictory to the current doctrine of the equality of states.

But we must leave aside considerations of this nature, for, though important, they are irrelevant to the subject now discussed. We must therefore proceed to examine the treaties that exist between the different nations of the world, so as to ascertain how far or to what extent, if at all, any state responsibility is thereby recognized in cases of riots or insurrections.

STATE PAPERS AND TREATIES

There has always existed a theoretical controversy as to the value of treaties as sources of international law. Some writers hold that such documents afford no index as to the existence of binding rules, while others avoid no pains in their endeavors to prove that treaties form one of the principal foundations of our science, thus regarding the stipulations therein contained with a sort of veneration. In point of fact, however, both views seem to be untenable. The error is undoubtedly due to the fact that the advocates of either of these theories, without subjecting the question to a severe analysis, proceed to indulge in generalizations for which no justification can possibly be found.

It is true, on the one hand, that there are treaties in existence whose only object is to settle for all times a difficulty between the signatory powers, without any regard to the existing rule of law on the subject, but rather in accordance with the wishes of that state which for the time being can assert its superiority in respect to the matter in dispute. Treaties may also be entered into for the purpose of bringing about a permanent change in the territorial sovereignty of a given state. It is evident that stipulations of this nature are of no importance to the international lawyer for they afford no evidence as to the existence or non-existence of legal rules. Therefore the statement sometimes made with regard to all treaties to the effect that they have no value as sources of law should be restricted to conventions of the type here described.

It must be admitted, on the other hand, that nations at times enter

into engagements whereby they really legislate, for they may, by means of conventions, create a new rule which, if expressly or tacitly adopted by a sufficiently large number of states, should be held henceforth to form part of the law of nations. When this is the case it is difficult to avoid the conclusion that there are some treaties that can rightly be considered as forming part of the sources of the law.

The treaties with which we are now going to deal, although not similar in nature to those above mentioned, may properly be said to constitute one of the sources of the rule whose existence in the domain of law has been amply shown by the practice of states in their dealings with one another. The conventions that exist whereby it is provided that a state is not responsible for the damage suffered by foreigners in the course of riots or civil wars are *declaratory* of the established practice of states, and hence they are really a source of international law because they set forth in a clear and unmistakable manner the rule that is generally considered to be of universal application. *Prima facie* it would appear that if a rule is deemed to be binding among states there is no need to incorporate it in conventional engagements. Only when the proposed course of action is novel or otherwise inconsistent with the established practice, it might be suggested, it is necessary that it should form the subject of treaties. It must be borne in mind, however, that, owing to considerations springing from the imperfect state of the law of nations, some rules do not receive the application and observance that are generally expected. Hence logic is superseded by convenience. The Latin American states have adopted the policy of expressly providing in their treaties with certain powers that there is no liability for damages sustained by foreigners in the event of civil wars, not because they seek to receive an exceptional treatment that international law does not warrant, but simply for the purpose of preventing the recurrence of illegal demands, and thus strengthen the accepted rule.

The hard lessons of experience—some examples of which have already been noticed—have compelled Latin American states to realize that it is useless for them to cite the accepted principles of international law applicable to such cases when the wronged persons are subjects or citizens of powerful nations. The feeling thus produced has prompted them to entrench themselves behind conventional engagements, or even to

set up their own municipal provisions against these unwarrantable demands. The movement directed to check the arbitrary manner of the European states of obtaining certain advantages for their subjects was started by Torres Caicedo,⁴⁹ and subsequently taken up by Calvo. Their endeavors in this connection, as will be seen, have had the direct result of arriving at a universal agreement in Latin America to resist, as far as political considerations would allow, any claims of this nature.

There is already a considerable number of commercial treaties, entered into by Latin American with European states or by one Latin American republic with another, which contain the so-called *clause de non-responsabilité*. The tendency of this clause is to provide for the non-liability of the state for the damages suffered by foreigners in the course of revolutions, or at the hands of savage tribes, provided that the damage is not caused by the fault or negligence of the governmental authorities. Sometimes the clause is silent as to the damage occasioned by the government itself or its officials, and speaks only of the acts of the insurgents or of savage tribes.

As an example of this provision it would be advisable to quote here the clause found in the treaty concluded by France and Mexico in the year 1886. It runs as follows:

Il est en outre convenu entre les parties contractantes, que leurs gouvernements respectifs, excepté les cas dans lesquels il y aura faute ou manque de surveillance de la part des autorités du pays ou de ses agents, ne se rendront pas réciproquement responsables pour les dommages, oppres-sions ou exactions que les nationaux de l'une viendraient à subir sur le territoire de l'autre en temps d'insurrection ou de guerre civile de la part des insurgés ou par le fait de tribus ou hordes sauvages qui refusent leur obéissance au gouvernement.⁵⁰

⁴⁹ See his works entitled *Mis ideas y mis principios* and *Unión latino-americana*.

⁵⁰ Art. XI, apud Martens, *Nouveau recueil général de traités*, 2e série, Tome XV, p. 843; or in *British and Foreign State Papers*, Vol. 77, p. 1094.

The following treaties also contain similar provisions:

Belgium and Mexico (1895), Art. 15, Martens, *op. cit.*, Vol. 23, p. 73;

Belgium and Venezuela (1884), Art. 18, " " " 11, p. 620;

Colombia and Germany (1892), Art. 20, " " " 19, p. 842;

Colombia and Italy (1892), Art. 21, " " " 22, p. 313;

Colombia and Spain (1894), Art. 4, Olivart, *Tratados de España*,

Vol. 11, p. 64;

Costa Rica and Salvador (1882), Art. 16, Martens, Vol. 14, p. 242;

Sometimes however, the provision of non-liability is absolute, that is to say, the state refuses to recognize any duty to pay compensation for the damages sustained by foreigners whether they are due to the acts of the insurgents or of the legitimate authorities, without any reference to the fault or negligence of the government. Thus in the treaty between Ecuador and Salvador of March 20, 1890,

It is stipulated that the respective governments are not responsible for the losses and injuries which the citizens of one republic may suffer in the territory of the other in time of foreign or civil war, with the exception of those cases in which they are so responsible to the natives, so that in no case shall a better treatment be accorded to them than to natural born citizens.⁵¹

The Institute of International Law, in laying down some rules intended to regulate the conduct of states when damages are sustained by foreigners in the course of internal disturbances, deprecated the practice of concluding treaties containing the clause of reciprocal irresponsibility. In the opinion of this learned body such provisions are mischievous because they excuse states from the performance of their duty to protect their nationals abroad and their duty to protect foreigners within

Costa Rica and Salvador	(1885), Art. 18, Martens,	Vol. 14, p. 248;
Ecuador and Mexico	(1888), Art. 3, "	" 18, p. 752;
Ecuador and Spain	(1888), Art. 3, Olivart,	" 11, p. 27;
Germany and Mexico	(1882), Art. 18, Martens,	" 9, p. 484;
Honduras and Salvador	(1878), Art. 14, "	" 14, p. 198;
Honduras and Spain	(1894), Art. 4, Olivart,	" 11, p. 156;
Italy and Mexico	(1889), Art. 12, Martens,	" 18, p. 771;
Mexico and Nicaragua	(1900), Art. 9, "	" 31, p. 25;
Mexico and Nicaragua	(1902), Art. 9, "	" 31, p. 426;
Mexico and Santo Domingo	(1889), Art. 11, "	" 18, p. 762;
Mexico and Santo Domingo	(1890), Art. 11, "	" 24, p. 55;
Mexico and Sweden	(1885), Art. 21, "	" 13, p. 690;
Nicaragua and Salvador	(1883), Art. 14, "	" 14, p. 232;
Peru and Spain	(1897), Art. 4, Olivart,	" 12, p. 348.

⁵¹ Article 7, *apud* Martens, Vol. 24, p. 17.

In the following treaties the provision of non-liability is absolute also:

Argentina and Peru	(1874), Art. 30, Martens,	Vol. 12, p. 450;
Guatemala and Honduras	(1885), Art. 29, "	" 14, p. 273;
Guatemala and Salvador	(1885), Art. 29, "	" 14, p. 273;
Honduras and Salvador	(1885), Art. 29, "	" 14, p. 273;
Holland and Mexico	(1897), Art. 10, "	" 33, p. 187;
Mexico and Salvador	(1893), Art. 23, "	" 20, p. 872.

their own territory. The Institute further thinks that states which, by reason of extraordinary circumstances, do not feel capable of granting a sufficiently efficacious protection to foreigners within their territories, can escape the consequences of such a state of things only by temporarily denying to foreigners access to their territory.⁵² It may be submitted, however, that the remedy offered would be, in the majority of cases, more harmful than the evil that it is intended to prevent. For if, in order to avoid the commission of injurious acts against foreigners, the state denies them access to its territories, it should also proceed to expel those who are already established there whenever a civil war or an insurrection breaks out. It is not difficult to see that the damage resulting from the adoption of this extreme measure would be considerably greater than the potential one which it is sought to avoid.

The attempts of the Latin American states to counteract the unwarrantable claims of powerful nations have not been confined to concluding treaties denying the existence of any liability in this connection. At the second Pan-American Conference a convention dealing with the rights of aliens was adopted by all the American Republics,⁵³ in which it was provided as follows:

The states shall not have, nor acknowledge, in favor of foreigners any other obligation or responsibilities further than those established by the Constitution and law in favor of natives. Therefore the state shall not be responsible for damages sustained by foreigners through the acts of rebels or individuals and in general for damages originating from fortuitous cases of any kind, considering as such acts of war, whether civil or national, except in case of negligence on the part of the constituted authorities in the fulfilment of their obligations.

Some states have also included this principle in their constitutions or in municipal laws. Thus Salvador in her Constitution of 1883, has laid it down that "neither Salvadorians nor foreigners shall in any case claim from the government any indemnity for damages or losses they may suffer in their persons or property caused by political disturbances; their right to claim redress from culpable functionaries or private individuals remains intact."⁵⁴ Guatemala in her provision dealing with

⁵² *Annuaire*, Vol. XVIII, p. 255.

⁵³ The delegations of the United States and Hayti refrained from voting.

⁵⁴ Constitution of Salvador, Art. 46.

this question refers only to "damages, prejudices, or expropriations which have not been executed by the legitimate authorities, or by agents of such authorities, in their public capacity." The provision goes on to say that "all those who, without public character, should decree contributions or forced loans, or commit acts of spoliation of any description, as also those who carry out such proceedings, shall be held directly and personally responsible with their property to the injured party."⁵⁵ And a Colombian law on the subject says that "the nation is only responsible to foreigners for expropriations and other actions made or done by the government itself or by its agents, and will in no case pay indemnity for contingent losses or injuries arising from such expropriations."⁵⁶

In 1888 Ecuador enacted a very strict and drastic law on the subject. The terms of this measure are as follows:

Article 1. The nation is not responsible for the losses and damages by the enemy during international or civil war or by tumults or mutinies; nor for those which may be caused in similar cases on the part of the government by means of military operations and the inevitable consequences of the war. Natives and foreigners will not have the right of being indemnified in these cases.

Article 2. Neither is the nation responsible for losses or injuries through gain ceasing or loss resulting, arising from the measures of security which the government may take in the persons of natives or foreigners, by ordering their arrest, confinement, sending into the interior, or expatriation, or extradition with respect to foreigners, when public order or the interests of neighboring states should render such measures necessary.

The diplomatic corps resident at Quito addressed a note to the Ecuadorian Minister of Foreign Affairs protesting against the contents of this law, and informing him at the same time that, in the event of any cases arising, they would act on the principle that municipal law could not alter international law to the prejudice of the subjects of other nations.⁵⁷

This seems a convenient place to draw the attention of the reader to

⁵⁵ Law of Feb. 21, 1894, Arts. 82, 83, *State Papers*, Vol. 86, p. 1291.

⁵⁶ Law of Nov. 26, 1888, Art. 11, *State Papers*, Vol. 79, 168.

⁵⁷ Law of July 17, 1888, *State Papers*, Vol. 79, pp. 166-7. See also Constitution of Hayti, Art. 185; Constitution of Honduras, Art. 142; Constitution of Venezuela, Art. 15; Law of Venezuela of April 16, 1903, Art. 17.

a clause that is sometimes found in the treaties entered into by the Latin American states. The purpose of the provision is to do away in general with the vexatious diplomatic intervention of the great powers in behalf of their subjects when the latter deem themselves injured by the government or the inhabitants of a Latin American republic. The purport of this clause then is simply to uphold the principle of territorial sovereignty which the states in question have been and are always anxious to maintain.

We mention in this connection the clause that provides for non-intervention by diplomatic means, because the interference of which we are now speaking generally takes place on account of the damages suffered by foreigners in the course of internal commotions. The provision is generally couched in the following terms:

The said contracting parties being desirous of avoiding everything which might jeopardize their friendly relations, engage that their diplomatic representatives shall not support officially, unless to arrive at a friendly arrangement, if warrantable under the circumstances, claims or complaints of private persons relative to matters cognizable by the civil or criminal law, which are before the courts of the country, unless there be a denial of justice, or in the case of a final judgment not being carried out. * * *⁵⁸

⁵⁸ Article 9 of the treaty between Ecuador and Salvador (1890), Martens, Vol. 24, p. 18.

A somewhat similar clause is found in the following treaties:

Colombia and Germany	(1892), Art. 20, Martens,	Vol. 19, p. 842;
Colombia and Italy	(1892), Art. 21, "	" 22, p. 313;
Colombia and Spain	(1894), Art. 6, Olivart,	" 11, p. 65;
Costa Rica and Salvador	(1882), Art. 15, Martens,	" 14, p. 242;
Costa Rica and Salvador	(1885), Art. 17, "	" 14, p. 248;
Ecuador and Mexico	(1888), Art. 6, "	" 18, p. 752;
France and Mexico	(1886), Art. 11, "	" 15, p. 843;
France and Venezuela	(1885), Art. 5, "	" 12, p. 684;
Germany and Mexico	(1882), Art. 18, "	" 9, p. 484;
Guatemala and Honduras	(1885), Art. 29, "	" 14, p. 273;
Guatemala and Salvador	(1885), Art. 29, "	" 14, p. 273;
Holland and Mexico	(1897), Art. 16, "	" 33, p. 188;
Honduras and Salvador	(1878), Art. 13, "	" 14, p. 198;
Honduras and Salvador	(1885), Art. 29, "	" 14, p. 273;
Mexico and Nicaragua	(1900), Art. 13, "	" 31, p. 25;
Mexico and Nicaragua	(1902), Art. 13, "	" 31, p. 427;
Mexico and Salvador	(1893), Art. 23, "	" 20, p. 871;

In the declaration subscribed by the Latin American republics at the Second Pan-American Conference, already alluded to, a provision is found dealing with this subject. It is enacted that:

Whenever a foreigner may have claims or complaints of a civil, criminal, or administrative nature against a state or its citizens, he shall apply to a competent court, filing at the same time his demands, and such claims or complaints shall not be made through diplomatic channels, except in cases where there may have been, on the part of the court, manifest denial of justice, or unusual delay, or evident violation of the principles of international law.

There are some writers who regard with little favor this principle of abstinence from diplomatic interposition, but it must be remembered that the provision does nothing more than to place foreigners on an equal footing with nationals, thus removing the unfairness of allowing the alien element of the community greater benefits on account of the diplomatic pressure that is unduly brought to bear on the weaker states. For the probability of threatening measures that may be adopted by the diplomatic agents in these countries lends itself to the double evil of granting the former a boundless scope for putting into practice the dictates of a mistaken and excessive sentiment of patriotism in behalf of their countrymen, and also of giving to subjects of powerful nations, when residing in Latin America, some reason for adopting a feeling of indifference, and even of disrespect, for the local courts. Such procedure cannot fail to create difficulties in the continuance of perfectly friendly

Mexico and Santo Domingo (1889), Art. 11,	Martens,	Vol. 18, p. 761;
Mexico and Santo Domingo (1890), Art. 11,	"	" 24, p. 55;
Mexico and Sweden (1885), Art. 21,	"	" 13, p. 690;
Nicaragua and Salvador (1883), Art. 13,	"	" 14, p. 232;
Peru and Spain (1897), Art. 6, Olivart,		" 12, p. 349;
Peru and the United States (1870), Art. 37, Martens,		" 1, p. 107;
Peru and the United States (1887), Art. 34,	"	" 22, p. 72;
Salvador and Venezuela (1883), Art. 5,	"	" 14, p. 216.
In the following treaties the clause is not so wide, for it only provides that aliens who take part in civil war may be treated as nationals, and, therefore, have no right to diplomatic intervention except in the case of denial of justice:		
Belgium and Ecuador (1887), Art. 3,	Martens,	Vol. 15, p. 741;
Belgium and Venezuela (1884), Art. 8,	"	" 11, p. 616;
Ecuador and Spain (1888),	Olivart,	" 9, p. 27;
Honduras and Spain (1894), Art. 3,	"	" 11, p. 155.

relations between nations, while, at the same time, hindering the local administration of a weak state, for every diplomatic intervention naturally deprives the government of much of its moral weight—a fact that is of supreme importance for all the members of the community, whether they be nationals or foreigners.

Some of the South and Central American states have also embodied in their laws the principle of non-intervention by diplomatic means. Thus Article 11 of the law of Venezuela of April 16, 1903, reads as follows:

Neither domiciled aliens nor those in transit have the right to have recourse to diplomatic intervention except when, legal means having been exhausted before the competent authorities, it is clear that there has been a denial of justice or a notorious injustice has been done, or that there has been an evident violation of the principles of international law.⁶⁰

And the Republic of Salvador had, as early as 1886, passed a law to the same effect. On this occasion, however, some of the diplomatic agents resident at San Salvador protested against the measure as being, in their opinion, contrary to the principles of international law.⁶¹ Costa Rica,⁶² Ecuador,⁶³ and Guatemala⁶⁴ follow the same principle. Honduras has adopted in this respect what may be called a drastic measure. After restricting the right to demand diplomatic intervention to cases of obvious denial of justice, this republic has provided that if foreigners disobey this injunction, and in consequence injury results to the country, they thereby lose the right to live in it.⁶⁴

These municipal provisions restricting the right to ask diplomatic intervention to the cases of denial of justice are due, as has already been pointed out, to the desire of Latin American states to uphold the principle of territorial jurisdiction, and thus finding a means of avoiding diplomatic pressure when adequate compensation is not granted for the damages resulting from a revolution.

⁶⁰ *State Papers*, Vol. 96, p. 647.

⁶¹ *State Papers*, Vol. 77, p. 116.

⁶² Law of December 20, 1886, Moore, *Digest of International Law*, Vol. VI, p. 269.

⁶³ Law of August 25, 1892, Arts. 10 and 12, *State Papers*, Vol. 84, p. 645.

⁶⁴ Law of February 21, 1894, Art. 71, *State Papers*, Vol. 86, p. 1290.

⁶⁴ Article 15 of the Constitution of Honduras of September 2, 1904; see also Article 37 of the Honduran law of April 10, 1895, *State Papers*, Vol. 87, p. 707.

Prima facie a measure of this kind would seem to be fair and equitable, for generally it is accompanied by a liberal provision to the effect that "foreigners are entitled to enjoy all the civil rights enjoyed by natives,"⁶⁵ and especially because it has been expressly laid down in the legislation of some of these countries that all those persons who have caused damage, whether they be state officials or private individuals, can be made personally liable.⁶⁶ It must be remembered also that in Latin America the state itself can be sued.⁶⁷

But from the strictly juridical point of view it is easy to see that enactments preventing foreigners from asking the protection of their country are wrong, for they involve the mistaken and baseless assumption that the alien's right to demand the protection of his government depends on the local law and not upon that of his own country. It is a principle universally accepted and always acted upon by states that every government has the right to protect its citizens abroad—a protection that must be granted, not in accordance with the manner provided by the state in which the person is living, but in the way established by its own laws so long as these do not conflict with the existing rules of international law.

It may be suggested, with sufficient reason it seems, that the strict limitations on the right of diplomatic intervention adopted by some of the minor states of Latin America have contributed, not to relieve them from the harsh presentation of foreign claims, but rather to prejudice the cause which they so stubbornly defend. Such enactments, being contrary to sound legal principles, rather discredit the state that issues them. On the face of these drastic declarations foreign governments would feel greater distrust for the decisions of the local courts in so far as their subjects would be affected thereby.

⁶⁵ Second Pan-American Conference, Convention on the rights of aliens, Art. 1. See also law of Guatemala of February 21, 1894, Art. 47, *State Papers*, Vol. 86, p. 1287; law of Venezuela of April 16, 1903, Art. 1, *State Papers*, Vol. 96, p. 647.

⁶⁶ See Art. 46 of the Constitution of Salvador; Art. 83 of the law of Guatemala of February 21, 1894, *State Papers*, Vol. 86, p. 1291.

⁶⁷ See, for instance, Constitution of Argentina, Art. 100; Constitution of Brazil, Art. 59; Constitution of Bolivia, Art. 111; Constitution of Mexico, Arts. 97 and 98; law of Venezuela of April 16, 1903, Art. 16; law of Guatemala of February 21, 1894, Art. 75.

It would be interesting at this stage of our inquiry to recapitulate what has been said in connection with conventional engagements declaring the non-liability of the contracting parties for damages caused to their respective subjects on account of civil war or insurrections. At the outset it may be stated that, as has been seen, many treaties on this subject have been entered into by the Latin American republics with one another. But it must be borne in mind that these treaties, though numerous, do not bring about any practical results, for the South American states never demand compensation for this kind of damage. They have always held that international law does not warrant any claims based on such acts of *force majeure*, and hence even when the citizens of one of them have sustained grave injuries in their persons or property owing to an insurrection in the territory of another, the government has abstained from taking measures demanding an indemnity.

On the other hand, the treaties concluded with the European nations, quite apart from the theoretical value that they all have as indicating, not only the existence, but also the tendency, of modern rules of international law, have led to the very practical result of relieving some republics of the New World from the pressure of claims on the part of several European states. Thus, according to agreements now existing, Belgium cannot demand compensation for her subjects injured by revolutions in Mexico and Venezuela. France, Holland, Sweden and Norway have bound themselves individually not to prosecute claims of this nature against Mexico. Germany and Italy have also signed treaties containing the same provision in favor of Colombia and Mexico. Spain will no longer claim the privilege for her subjects in Colombia, Ecuador, Honduras, and Peru. It thus appears that nearly all the more important states have already agreed to accept the clause of irresponsibility. Austria-Hungary and Russia could hardly have an interest in this question since their subjects have not, to any large extent, come in contact with the Central and South American republics. This fact would easily explain the absence of any such provision from their treaties. The same reason, however, cannot be suggested for the non-existence of the clause in the treaties concluded by the Latin American republics with Great Britain and the United States. These two great powers, although in frequent intercourse with Latin America owing to the large

number of their subjects who own considerable property there, have not, up to the present, concluded any treaty that bears out the recognized principle of irresponsibility.

It should also be observed that the treaties containing the clause that prevents diplomatic interposition are already numerous. France, Germany, Holland, Italy, and the United States⁶⁸ are among the powers which have agreed to leave their subjects or citizens residing in those countries to avail themselves only of the remedies afforded by the local law, and thus obtain by this means the compensation, if any, that the municipal provisions grant.

From the foregoing sketch it becomes evident that the following propositions may safely be advanced as a summary of the subject:

I. That individuals as such are not the subjects of any rights granted by international law.

II. That according to legal theory as expressed in the maxim *nemo tenetur ad impossibile* states are not responsible for the injuries suffered by foreigners in their person or property in the course of a riot, an insurrection, or a civil war.

III. That general principles of expediency do not warrant the foundation of any liability in the above cases.

IV. That the more important states have always refused to entertain any demands for indemnity in cases of damages thus occurring.

V. That although certain Latin American states have sometimes made grants in respect of such damages, they have insisted that such payment is to be considered as a *liberality* or *bounty*, and not as an *indemnity*.

VI. That conventional international law tends to show that there is no such liability.

⁶⁸ The United States have consented to sign only one treaty containing this provision, *viz.*, the treaty with Peru of 1870, renewed in 1887. In 1890 the Government of Ecuador proposed to that of the United States the incorporation into their treaty relations of a stipulation precluding "recourse to diplomatic remedies and claims before exhausting all other means of redress, through the courts of justice, or proper authorities, including appeals against judges and courts." The State Department blandly declined the proposal on the ground that such stipulations, "although not novel in design, are yet so in form, and might for that reason be open to misconstruction." (Moore, *Digest of International Law*, Vol. VI, p. 270.)

VII. That the majority of writers on international law are decidedly in favor of the view that denies the existence of any international obligation in this respect.

VIII. That since there is no *international* obligation, there cannot be a right of diplomatic intervention by the states whose nationals have suffered.

IX. That foreigners are entitled only to those remedies granted by the local law.

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THE SETTLEMENT OF THE SAMOAN CASES

The recent appropriation, made by Congress, to reimburse those American citizens who suffered property damages and losses by reason of the unlawful and unjustifiable bombardment of Apia, Samoa, by the British and American warships during the year 1899 has revived an interest in the unusual controversy then pending over the election of a native king, and aroused a curiosity as to the reason of the appropriation at this late date, over a decade since the damages were committed.

In 1889 a treaty was entered into between Germany, Great Britain, and the United States providing for the neutrality and autonomous government of the Samoan Islands. By this treaty a Supreme Court was established in Samoa consisting of one judge, styled "Chief Justice of Samoa." Article I of the treaty provided that, in case of the death of the king, his "successor shall be duly elected according to the laws and customs of Samoa."

It is declared that the Islands of Samoa are neutral territory in which the citizens and subjects of the three signatory Powers have equal rights of residence, trade, and personal protection. The three Powers recognize the independence of the Samoan Government and the free right of the natives to elect their Chief or King and choose their form of government according to their own laws and customs. Neither of the Powers shall exercise any separate control over the Islands or the Government thereof.

It is further declared, with a view to the prompt restoration of peace and good order in the said Islands, and in view of the difficulties which would surround an election in the present disordered condition of their Government, that Malietoa Laupepa, who was formerly made and appointed King on the 12th day of July, 1881, and was so recognized by the three Powers, shall again be so recognized hereafter in the exercise of such authority, unless the three Powers shall by common accord otherwise declare; and his successor shall be duly elected according to the laws and customs of Samoa.¹

¹ For treaty of 1889, see Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1776-1909*, Vol. II, p. 1576.

Article III, Section 6, provided that in case any dispute should thereafter arise "respecting the rightful election or appointment of King," such dispute shall not lead to war, but shall be left to and decided in writing, by the Chief Justice of Samoa, which decision shall be accepted by and binding on the signatory governments.

In case any question shall hereafter arise in Samoa respecting the rightful election or appointment of King or of any other Chief claiming authority over the Islands; or respecting the validity of the powers which the King or any Chief may claim in the exercise of his office, such question shall not lead to war but shall be presented for decision to the Chief Justice of Samoa, who shall decide it in writing, conformably to the provisions of this Act and to the laws and customs of Samoa not in conflict therewith; and the signatory Governments will accept and abide by such decision.²

Malietao Laupepa, King of Samoa, died August 22, 1898. Immediately following the ensuing election, a dispute arose as to whether one Mataafa or one Tammafili had been elected king, and, on submission of the issue, the Supreme Justice of Samoa, Honorable William L. Chambers, an American citizen, on December 31, 1898, decided in favor of Tammafili. The Mataafa party rejected the decision, and strife and confusion ensued, in which the people and officials of German origin were partisans on one side, and those of United States and British nativity partisans on the other.

On the 4th of January, 1899, the consular representatives in Samoa of Germany, Great Britain, and the United States issued a proclamation recognizing Mataafa and thirteen of his chiefs as the provisional government of Samoa pending instructions from the three treaty Powers.

It seems that, prior to the middle of March, the British and United States naval commanders had been instrumental in attracting and bringing numerous adherents of Tammafili to Apia and vicinity, and had supplied them with arms and ammunition; and shortly thereafter, on March 16, 1899, the American war-ship *Philadelphia* and the British war-ships *Porpoise* and *Royalist* opened fire across the town of Apia, in Samoa, and the land in rear of the town, their operations being directed against the forces of Mataafa. Active military operations were then

² See Malloy, *Treaties, etc.*, p. 1576.

carried on extending into the interior, and involving foraging for food and other military supplies, and destruction of property. These operations were conducted in part under the direction of the British and United States naval commanders, and were participated in by sailors and marines from the ships of both nations. In the town of Apia, the street traffic was subjected to severe and rigid control by the military authorities of Great Britain and the United States, who posted sentries and allowed only those with passports from these authorities to pass. This condition of affairs continued in more or less aggravated form until in May of the same year. Out of these operations arose serious complaints on the part of residents of Samoa of several nationalities of losses and damages sustained by them, and claims for reparation.

The principal complainants against the acts of the British and American war-ships were Germans, and, as a result of representations made by them to their home government, a convention was entered into, on November 7, 1899, between Germany, Great Britain, and the United States, whereby the three governments requested Oscar, King of Sweden and Norway, to arbitrate the differences between them in regard to the claims growing out of these military operations, and provided that "it shall, also, be decided by this arbitration whether, and eventually to what extent, either of the three governments is bound alone or jointly with the others to make good these losses."³ King Oscar accepted the trust, and, after due hearing, rendered his decision, on October 14, 1902, as follows:

We are of opinion that the military action in question, viz., the bringing back of the Malietoans and the distribution to them of arms and ammunition, the bombardment, the military operations on shore, and the stopping of the street traffic can not be considered as having been warranted.

And that, therefore, His Britannic Majesty's Government and the United States Government are responsible, under the Convention of the 7th of November, 1899, for losses caused by said military action; while reserving for a future decision the question as to the extent to which the two Governments, or each of them, may be considered responsible for such losses.⁴

³ For arbitration convention of 1899, see Malloy, *Treaties, etc.*, Vol. II, p. 1589.

⁴ For award of King of Sweden and Norway of October 14, 1902, see Malloy, *Treaties, etc.*, Vol. II, p. 1591.

No decision was ever rendered on the reserved question, for the reason that, subsequently, the Governments of Great Britain and the United States came to an agreement that each would pay one-half of the sums found due to the subjects of other governments, and that each would take care of the losses found due its own subjects.

Following this agreement, the United States and Great Britain appointed two agents, Messrs. Crane and Richards, to whom all of the claims were submitted. Their report was made in 1903, and they held that to entitle the claimants to recover, they must prove that the damages suffered resulted from the military operations. They found that the majority of losses had been caused by the pillaging of natives, and, for that reason, the American agent recommended the payment of only one American claim. The small amount recommended in payment of the German claims led to a protest by that government against the conclusions of the agents "on the ground that the provisions for arbitration did not say that the losses must have been immediately caused by such military action, but that they must have been suffered in consequence of said action, which latter, it was stated, was the case with the majority of the German claims." Consequently, the claims of Germany were again submitted to the agents, who recommended the payment of forty thousand dollars (\$40,000). The report concluded that:

If a settlement is effected with Germany on this more liberal basis, other countries will be entitled to expect similar treatment, and British subjects and American citizens may, also, demand equally favorable treatment."⁵

The United States and Great Britain thereupon reached a settlement with all of the foreign governments whose citizens had been damaged, and together they paid, in equal moieties, \$40,000.00 to Germany;⁶ \$6,782.26 to France;⁷ \$1,520.00 to Denmark;⁸ \$750.00 to Sweden;⁹ and

⁵ See letter of January 9, 1913, from Secretary Knox to President Taft, Agent's Report, H. Doc. No. 1257, 62d Cong., 3d Sess., p. 7.

⁶ See S. Doc. No. 85, 59th Cong., 1st Sess. and H. Rep., No. 4414, 59th Cong., 1st Sess.

⁷ See H. Doc. No. 612, 59th Cong., 1st Sess.

⁸ See S. Doc. No. 160, 59th Cong., 1st Sess.

⁹ See S. Doc. No. 864, 60th Cong., 1st Sess.

\$450.00 to Norway.¹⁰ The British Government not only paid its share of losses by foreign claimants, but, also, paid its own subjects their losses in the sum of £3,645, or about \$18,000, while the claims of citizens of the United States, in all respects identical in origin, alone remained unpaid until this year, notwithstanding that they were filed in the Department of State almost fourteen years ago.

While the procedure adopted for collecting these meritorious claims consumed considerable time, the results obtained fully justify the method followed. Although these were cases by citizens of the United States against their own government, which, apparently, might have been justiciable in the Court of Claims, by the securing of a special Act of Congress conferring jurisdiction for that specific purpose, this method was avoided because of the difficulty of securing an equitable consideration of the claims from the broad view of international law.

Without a special Act of Congress, the Court of Claims would not have general jurisdiction of cases of this character because Section 1066 of the Revised Statutes enacts that:

The jurisdiction of said Court shall not extend to any claim against the Government not pending therein on December 1, 1862, growing out of or dependent on any Treaty stipulations entered into with foreign nations or with the Indian tribes.

It was thus necessary for the claimants to depend entirely upon Congress and the Department of State to secure the redress desired.

On March 14, 1910, a bill was reported in the Senate by Senator Shively, from the Committee on Foreign Affairs, which became a law, being approved June 23, 1910, and which read as follows:

That the Secretary of State be, and he hereby is, authorized and directed to ascertain the amounts due, if any, respectively, to American citizens on claims heretofore filed in the Department of State growing out of the joint naval operations of the United States and Great Britain in and about the Town of Apia, in the Samoan Islands, in the months of March, April, and May, eighteen hundred and ninety-nine, and covered by the provisions of the "Convention between the United States, Germany, and Great Britain relating to the settlement of Samoan claims," concluded November seventh, eighteen hundred and ninety-nine, and the decision thereunder by His Majesty, Oscar II, King of

¹⁰ See H. Rep. No. 1321, 61st Cong., 1st Sess.

Sweden and Norway, given at Stockholm, October fourteenth, nineteen hundred and two, and report the same to Congress.¹¹

As it was then found that the Secretary of State did not have the necessary funds to make the investigation directed, Congress, during the winter of 1911, made a specific appropriation for that purpose.¹²

On April 15, 1911, the Secretary of State designated Joseph R. Baker, Esq., of the Solicitor's Office of the Department of State, as agent on behalf of the Department, and directed him to proceed to the Samoan Islands and investigate the claims, and, "having carefully and thoroughly investigated said alleged claims, you will make to this Department a full and complete written report of your investigation, including, in your report, the documentary evidence, properly certified, upon which it is based." Mr. Baker was, also, appointed vice consul, in order that he might be empowered to examine witnesses under oath.

Acting under these instructions and authority, Mr. Baker proceeded to the Islands, and, after a careful and thorough investigation, made his report, on October 13, 1911, to the Secretary of State, who, on January 9, 1913, submitted the same to the President, who, in turn, on the next day, transmitted it to Congress with the statement that the finding and recommendation by the agent of the specific amounts equitably due to the claimants had been approved by the Secretary of State, who submitted, for the consideration of Congress, the question of an immediate appropriation for the payment of the amounts recommended.¹³

In March, 1913, Congress, realizing that there had been an unwarranted delay in the consideration of the cases, and that it had discriminated against American citizens in having failed to settle with them at the time it paid the citizens of other countries, promptly complied with its international obligation, arising by reason of international convention and arbitral award, and appropriated the sum of \$14,811.42, the full amount recommended by the agent.

It may be added that by a convention concluded December second,

¹¹ See S. 7158, 61st Cong., 2nd Sess., and Act of Congress approved June 23, 1910 (Public No. 224).

¹² See diplomatic and consular appropriation act approved March 3, 1911, H. R., 32866 (Public No. 452).

¹³ For Report of Agent, see H. Doc. No. 1257, 62nd Cong., 3rd Sess.

1899, between the United States, Germany, and Great Britain, the treaty of 1889 was annulled, and an arrangement was made whereby the Island of Tutuila and certain other islands of the Samoan group passed to the United States, while the Islands of Upolu and Savaii and certain other islands of the group passed to Germany.¹⁴

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¹⁴ For treaty of 1899, see Malloy, *Treaties, etc.*, Vol. II, p. 1595.

SHOULD GREAT BRITAIN AND THE UNITED STATES BE REPRESENTED AT THE HAGUE CONFERENCES ON PRI- VATE INTERNATIONAL LAW?¹

At the Antwerp meeting of the International Law Association in 1903, a paper was presented by Mr. Justice Phillimore indicating the desirability of having Great Britain participate in the Hague Conferences on Private International Law. At the same meeting, a resolution was adopted on the motion of Mr. Justice Kennedy to the effect that the Association "should take steps respectfully to lay before the British Government the points dealt with in that paper" with a view to its participation in the conferences. Although not referring in terms to America, the resolution was seconded by Dr. Gregory, an American member, and the discussion showed plainly that it was the sense of the meeting that the resolution was intended to apply also to the United States.²

At the time, fifteen nations had already participated in the conferences. In the following year, 1904, this number was increased by a delegation from the Empire of Japan. But no progress seems to have been made since then in effecting the purpose of the resolution on either side of the Atlantic.

In the present paper our intention is not to discuss the technical labors of the Hague Conferences on Private International Law. Others have shown that there are no insuperable *technical* difficulties which would prevent the extension of the movement to Great Britain and the United States. We venture, however, to emphasize the real scope and purpose of the conferences, which, we regret to say, is sometimes lost sight of in those jurisdictions.

It is *not* the object of the conferences to accomplish a unification of substantive law in any field. The conferences differ thus radically from

¹ A paper read at the Madrid Conference of the International Law Association, October, 1913.

² Report of the 21st Conference, 1903, p. 80.

those in which Great Britain and the United States have recently participated, for unifying the law of negotiable instruments. The divergence of law in the various jurisdictions is assumed and constitutes not only the basis but the very *raison d'être* of the Conferences on Private International Law. Their purpose is to arrive at agreement between the nations, by treaties dealing with the various branches of private rights, designating the particular system of substantive law which shall be applicable where, from the nature of the issue and circumstances, it is necessary to make a choice between two or more divergent systems. Or as it is expressed in a recent treatise,³ the conferences seek to arrive at agreement in order that the particular issue should be determined according to the *same* system of law no matter in what forum the issue is ultimately presented.

The practical ideal toward which the conferences are striving can be illustrated in a more concrete fashion by referring to the situation created by two individuals, one domiciled, let us say, in Paris, the other in New York, who enter into negotiations at Madrid relating to some matter of business, in consequence of which both sign a written agreement in Madrid in which they voluntarily agree to have all disputes relating to the interpretation and effect of the agreement determined according to Spanish law. Speaking generally, it would be quite immaterial whether a subsequent dispute arising between the parties should ultimately come before a court in France, in the United States, or in Great Britain. Barring any question of public policy or public order, the agreement of the parties would be given effect and Spanish law applied.

In the case supposed, the system of law applicable is known in advance. In a similar manner, the system of law is determined in advance where sovereign governments, through their proper organs, agree upon the selection of particular systems of law applicable to given issues. In this way agreement has been arrived at between European countries, relating to such questions as marriage, divorce and separation, the guardianship of minors, the property relations of husband and wife, and other topics. By some of these international agreements, the competent *forum* has also been designated in advance.

³ Meili & Mamelok, *Internationales Privat und Zivilprozessrecht auf Grund der Haager Konventionen* (Zurich, 1911), p. 34.

The conferences also endeavor to arrive at a closer approach in the administration of law where governmental assistance or coöperation is necessary beyond the jurisdiction of one country. Thus, the communication of legal acts and records has been elevated among the nations participating in the conventions to the position of a formal obligation in international law. Letters rogatory issued by a court of one country to take testimony in another are recognized by the participating nations and their execution is sanctioned by treaty. This branch of the labors of the conferences relating to civil procedure rests upon the doctrine that the regular administration of law is a subject of international, as well as local concern; but so far as it is specifically local or national, its purpose is better subserved and assured through a system of reciprocity.

We have endeavored to outline briefly the basic objects of the conferences in order to form a clearer judgment upon the question whether the results to be accomplished would represent practical benefits in the administration of justice in Great Britain and the United States. We should also seek to determine whether this progress may be accomplished in these two great spheres of law by the *modus agendi* of the conferences.

We think it can be stated that the treaties already worked out and accepted by nations of the Continent, have in the main worked satisfactorily. Although the treaties originally were adopted for a period of only five years, they have been renewed. While some of the treaties have not been adopted by all of the participating nations, the tendency is to extend the field of the conferences to other branches of law not yet covered, and to make the conferences permanent. If, then, experience under the conferences has proved to be an advance over prior conditions, why should the Anglo-American sphere stand aloof from a legal movement which, without drawing too much on the imagination, may be called world-wide?

The reason first assigned on behalf of Great Britain for not participating in the conferences was the "peculiar" nature of English law. But as we have already pointed out, the conferences exist upon the very basis of divergence. If it be said that the rules recognized in Great Britain and the United States for solving conflicts of law are divergent, giving greater emphasis to the law of the domicile and the *lex loci actus*, we may

with justice reply that other jurisdictions, *e. g.*, Denmark, Norway, Sweden and Switzerland, follow similar principles in many cases and, nevertheless, have participated in the conferences, and adhered to the conventions. Indeed, our Continental friends frequently express the hope that Great Britain and the United States will ultimately be represented for the very reason that they are beginning to feel that the rule of the *lex patriæ* has been carried too far, and that representatives of the Anglo-American sphere would constitute a desirable counterbalance in the opposite direction tending toward a compromise beneficial to all.

Within the field of *procedure* this problem does not confront us at all. An agreement under which judicial records may be authenticated in foreign jurisdictions so as to be accepted as competent evidence in domestic courts, involves no change in the system of law. It enhances the dignity and authority of the law in each particular jurisdiction and promotes the certainty which all justice demands. Every practitioner in Great Britain and the United States having to authenticate records from countries of the European Continent is confronted with difficulty, with which the facility of accomplishing the same task within the treaty union is in marked contrast. Furthermore, when testimony in a domestic court is required of witnesses located in foreign countries, letters rogatory and commissions to take testimony are futile unless the authority which they represent is sanctioned by the government of the country to which they are directed. Without entering into the details of this matter, it is well known that the attempt to subpoena a witness, on the part of a consul or other commissioner, to appear for the purpose of answering interrogatories is regarded as in derogation of the sovereignty of the country to which the consul is accredited or in which the commissioner seeks to act. Indeed, representations have been made to the United States in a diplomatic way by at least one country (Germany) objecting to this procedure. The result is that in most cases testimony taken abroad must be voluntary, to the great detriment of the orderly procedure of justice.⁴

That our friends upon the Continent are desirous of the participation of Great Britain and the United States, there can be no doubt. At the meeting of the International Society for Comparative Jurisprudence

⁴ See Moore's *Digest of International Law*, Vol II, pp. 124, 125.

held at Heidelberg in September, 1911, the writer presented a paper upon the "Doctrines of Private International Law in England and America Contrasted with those of Continental Europe." The conference unanimously adopted the following *vœux*:—

1. That the Anglo-American and Continental European systems of Private International Law should, through mutual concessions, aim at a closer approach toward uniformity;
2. That an international commission should be constituted for the purpose of studying and reporting upon the best method of accomplishing this purpose;
3. That Great Britain and the United States should send delegates to future Conferences upon Private International Law to be held at The Hague, for the purpose of reporting the results of the Conferences to their respective governments.

It will doubtless be of interest to know that as a result of these resolutions a committee has been constituted composed of many distinguished authorities in the field of private international law in Europe and the United States and that it has entered upon its labors.

The principal difficulties which the supporters of this movement have to contend with are those connected with the legislative policy of Great Britain and the constitutional structure of the United States. In Great Britain the treaty-making power resides ultimately in Parliament, where, it is said, there is a strong objection to the modification of domestic law through international agreement. On the other hand, Parliament has itself enacted bills relating to the administration of local justice which, in their very nature, contemplate the ratification of treaties with foreign nations relating to private law. One of the most interesting examples of this kind is the Foreign Law Ascertainment Act,⁵ providing for the proof of foreign law by commissions addressed to the highest courts of foreign states. In the United States, it must be frankly recognized that the treaty-making power is opposed to restricting the liberty of the States in matters of private law. Yet treaties have been passed assumed to be binding upon the several States governing the personal and property rights of aliens and the administration of their estates. Recently there has been a recrudescence of States' rights feeling in this matter and federal policy might be against any attempt to re-

⁵ 24 & 25 Vict., ch. 11.

strict it in the absence of a necessity deemed imperative. On the other hand, there is also a centripetal movement in favor of greater central authority in many matters, and in this connection it has been pointed out that Congress, under the judicial clause of the Constitution (Art. III) has the power to legislate even on questions otherwise reserved to the States, affecting all controversies in the federal courts between citizens of the different States and between citizens and aliens.⁶

Even assuming that federal action were impossible, we might still rely upon a movement of great importance and vast possibilities, namely the Conferences of the Commissioners on Uniform State Laws. These commissioners are officially appointed by the separate States to work out drafts of statutes for uniform adoption in all the States. As a result, we already have a Negotiable Instruments Act uniform in forty States, a Warehouse Receipts Act in twenty-four States, a Sales Act, a Divorce Act, a Stock Transfer Act and an Act Relating to Wills Executed without the State. The latter statute is entirely within the sphere of private international law. Some of the others, especially the Divorce Act, deal with the conflict of laws, incidentally with the substantive law. We desire to call attention at this time to this movement because it indicates a method by which coöperation with other nations can be made effective within the United States by *State* action.

There should be no attempt to gloss over the difficulties. The idealist is ever over-sanguine; in this, as in other matters requiring international coöperation, we should not be disappointed with modest results. The proposition is not whether Great Britain or the United States is in a position immediately to adopt any of the conventions of The Hague. It is simply whether we should continue heedlessly to neglect a widespread movement for greater certainty and efficiency in the administration of domestic justice. The governments of the two nations should at least be informed of the nature of the movement and the progress accomplished among the participating nations. To this end they should be represented by competent delegates in sympathy with the general objects to be accomplished. The representation which Great Britain and the United States had through official delegates to the International Conference for the Unification of the Law of Negotiable Instru-

⁶ Goodnow in 25 *Political Science Quarterly*, 577.

ments, though not resulting in adhesion to the proposed treaty, was beneficial. The divergence between the two spheres of law upon this topic was not as great as was at first supposed, and the knowledge gained at the conferences served the double purpose of disclosing the superior features of either system and making ultimate unification possible.

In the field of private international law we accept the divergences and seek to assign to each jurisdiction its sphere of authority. Without this, the scope of law in all jurisdictions remains uncertain and justice may be defeated by a mere change of the forum. With us in America, this has led to what may be termed an interstate scandal, at least in one branch of law, namely that of divorce. Indeed, I will venture to say that the family tie everywhere is weaker by reason of the lack of a guiding international and interstate principle to determine the forum and law.

The re-examination of the basic concepts of all our institutions as a result of modern social and economic conditions is nowhere more profound than in Great Britain and the United States. The searching test as to whether our systems of law are best for our day and generation is changing many things in the domain of private law. Though the Anglo-Saxon nations pride themselves on their greater political freedom, they have been obliged to adopt many principles long established on the Continent in order to accomplish social and economic justice. Let us retreat from our "splendid isolation," insular in Great Britain, continental in the United States, and join hands with our sister nations, in council, if not in action, in promoting a movement which makes for the certainty of justice and therefore for stability and peace among the nations.

ARTHUR K. KUHN.

POINSETT'S MISSION TO MEXICO: A DISCUSSION OF HIS INTERFERENCE IN INTERNAL AFFAIRS

The first United States minister to Mexico was Joel R. Poinsett. To the ordinary mind, however, his chief title to fame does not rest on his filling this or a number of other official posts; but on the fact that he made known to the world the beautiful Christmas flower which in honor of him was named "poinsettia." But even this discovery was a result of his diplomatic appointment; for it was while on his mission to Mexico that he observed it and brought it to the attention of botanists. It is the purpose of this article to study only the minister's personal conduct while in Mexico and his relations with the government and people, explaining the grounds for the charges made against him of meddling in the internal affairs of the country.*

DIFFICULTIES AND DELAYS IN CHOOSING A MINISTER

While Poinsett was the first minister to reach Mexico, he was not the first appointed to fill the post. In order to understand the reasons for the delay in making the appointment and to appreciate the difficulties which Poinsett felt were a consequence of that delay, it will be desirable to study with some fulness the various efforts made to fill the post during the two years preceding Poinsett's appointment. The relations between these efforts and current political issues in the United States were very intimate and interesting. In January of 1823, John Quincy Adams, Secretary of State, suggested to President Monroe that the Mexican mission be offered to Andrew Jackson. The President thought Jackson's quickness and violence of temper might make the expediency of his

* The negotiations conducted by him while there will be published later by the Johns Hopkins Press under the title, *Diplomatic Relations between Mexico and the United States from 1821 to 1829*, in the series of Albert Shaw Lectures on diplomatic history. That study will include also most of the contents of this article, but in a modified form.

appointment questionable. Adams believed he would do nothing to injure the interests of his country; but said there was a more serious difficulty. The legislature of Tennessee had nominated him for the presidency in the election to take place next year. To send him on a mission would look like trying to get him out of the way. The President agreed there was some danger of that.¹

To get Jackson out of the way was exactly what Adams wanted to do, though he probably would not have admitted it even to himself. But of course he did not want it to look as if he were trying to do so. He had already attempted to rid himself of a still more formidable rival, as he thought, by suggesting that Henry Clay be honored by being appointed first minister to Colombia, as a reward for Clay's long and enthusiastic advocacy of the cause of human liberty and the recognition of the independence of the Spanish-American states, which advocacy had considerably embarrassed Adams in the slow, cautious policy which he had pursued in the matter.² In spite of the difficulty, however, Adams addressed a letter to Jackson on February 19, 1823, enclosing the latter's commission from the President as minister to Mexico, adding the gentle compliment, "Permit me to express my own hopes that our country may on this occasion have the benefit of your services."³ The honor came as a complete surprise to Jackson; but he rose to the occasion. Nearly a month later he replied that the President had said he was under no obligation to accept since he had not been consulted before the nomination was made. As a sort of sugar-coating for the dose of disappointment, and to conceal his real motive as artfully as Adams had done, Jackson said he believed no American minister could at the time effect any beneficial treaty with Mexico, because that country was engaged in a new struggle for liberty against the efforts of the usurper Iturbide to establish himself as emperor. Furthermore, because of

¹ Adams, *Memoirs*, VI, 128.

² Adams, *Memoirs*, VI, 26. It is interesting to notice the magnanimity with which Adams felt he was acting. He says: "In pursuing a generous policy towards him, as an enemy and a rival, I do some violence to my inclination, and shall be none the better treated by him; but I look to personal considerations only to discard them, and regard only the public interests."

³ Adams to Jackson, Feb. 19, 1823, MS. Department of State, Instructions, IX, 169.

Jackson's well known sympathies for the republicans of Mexico he thought it would be embarrassing for him to go as minister to the imperial government.⁴

The expected collapse of Iturbide's empire very shortly after Jackson's refusal of the mission and the long period of uncertainty, during which the Mexican Government was being reorganized, caused the government at Washington to abandon for the time its efforts to fill the post. It was not until the beginning of the next year that the matter was again seriously taken up. On January 5, 1824, Adams entered in his diary the fact that he had discussed the fitness of Ninian Edwards for the mission. Edwards had been territorial governor of Illinois during the whole of that commonwealth's territorial period and was just about to complete his term as one of the first two senators from that new State. On January 17, Adams says he had urged President Monroe to appoint Edwards although he felt that he had been mistreated by Edwards. The President favored G. M. Dallas who was also urged for the appointment by the Pennsylvania delegation in Congress. But Adams opposed Dallas on the ground that "he was not yet of the age and political standing suitable for that appointment." The fact that the relation of the appointment to the coming presidential election was a matter for serious consideration is evident from Adams' statement, "as to its bearing on the presidential election, I must be indifferent between Mr. Edwards and Mr. Dallas, both of whom are avowed partisans of Mr. Calhoun."⁵ He was apparently satisfied that the post should go to the Calhounites, since the great South Carolinian's ambition had been postponed for the present by conceding to him the position of Vice-President on the ticket in the famous contest of that year. Adams' influence prevailed. Edwards was nominated, and on March 4, 1824, his nomination was confirmed by the Senate.⁶ A few days later he re-

⁴ Jackson to Adams, March 15, 1823, MS. Dept. of State, Mexico, Despatches, I. Between the time of Jackson's appointment and his refusal, Zozaya, the Mexican minister lately arrived in Washington, wrote his government of the choice, and the probability that Jackson would not accept. *La Diplomacia Mexicana*, I, 104. The date of Zozaya's note is incorrectly given. Reeves, J. S., *Diplomacy under Tyler and Polk*, 60, mentions Jackson's appointment and refusal.

⁵ Adams, *Memoirs*, VI, 227, 233, 234, 241, 243.

⁶ Jackson to Edwards, March 4, 1824, congratulating him on his appointment,

signed his seat in that body, and in less than a month had left Washington for his home in Illinois to prepare for an early departure for Mexico.⁷

At this juncture the relation between the appointment to Mexico and the notorious presidential contest of 1824 becomes more intimate and interesting. Just about the time Edwards was leaving Washington some unkind things were said about him by supporters of Crawford, the fourth candidate for the presidency. While on his way towards Illinois Edwards returned the compliment by addressing to the House of Representatives a communication declaring himself to have been the author of an anonymous statement which had appeared some time before charging Crawford with official misconduct as Secretary of the Treasury. He now renewed the accusation. This caused great excitement. A Congressional investigating committee was appointed, and given power to send for persons and papers. Monroe was very indignant at Edwards and thought he ought to resign at once. He instructed Adams to request Edwards not to proceed on his mission for the present but to await the orders of the committee.⁸ He did so and returned to Washington. The investigation was political rather than judicial, and eminently unfair to Edwards, being in the hands of Crawford's friends. Calhoun had foreseen that it would be so. In a preliminary report of the Senate committee all the facts charged by Edwards were admitted; but Crawford was acquitted of any evil intention. Then to throw dust into the air in the hope that Crawford might hide behind the cloud,

Washburne, *The Edwards Papers*, 222; Rufus King to Edwards, March 4, 1824, *ibid.*, 222; Adams, *Memoirs*, VI, 245.

⁷ Edwards to Adams, March 9, 1824, MS. Dept. of State, Mex., Desp. I. This shows anxiety to get to Vera Cruz as soon as possible to avoid being on the coast during the rainy, sickly season.

Torrens to Secretario, Washington, 23 de Marzo de 1824, MS. Relaciones Exteriores. In this letter the Mexican chargé told his government of Edwards' appointment, resignation from the Senate, and proposed route, saying he would probably arrive in July.

⁸ Adams to Edwards, April 22, 1824, MS. Dept. of State, Instr., X, 171; Adams, *Memoirs*, VI, 296-301; D. P. Cook to Edwards, April 17, 1824, Washburne, *The Edwards Papers*, 223.

Torrens to Secretario, 5 de Mayo de 1824, MS. Relaciones Exteriores, said it was thought that another minister would be chosen, since it was supposed Mexico would take Edwards' appointment as an insult.

some indiscreet things Edwards had said and done were brought forward and discussed. Monroe brought pressure to bear and on June 22, after he found further resistance hopeless, Edwards resigned, declaring to the President that he thereby made a voluntary surrender of what his enemies had tried to force from him, and that his sole reason for doing it was to relieve Monroe from any further embarrassment because of him. A cabinet meeting in session when the resignation was presented agreed that Edwards was a much injured man.⁹ This Edwards-Crawford controversy occupied most of the attention of the cabinet meetings from May 18 to June 22, if it is safe to judge from the space given to it in the hundred pages of Adams' diary covering this period.¹⁰ It was the influence which the affair exerted on the election, and the fact that the administration was dragged into the controversy that made it seem so immensely important.

The resignation of Edwards left the Mexican post still vacant, and the interests of the United States in Mexico still neglected. Almost another year passed before the appointment was made again. Some suspected and charged that this and other vacant diplomatic posts were being held open by Adams to purchase support in the presidential conflict. He declared that this was a mistaken notion, and that he would as soon all should be filled; but still they remained open. The threatened return to power of Iturbide after his year of exile had something to do with again delaying the Mexican appointment. As the delay lengthened the number of candidates for the Mexican place increased. The most prominent were Dallas, who had been urged when Edwards was appointed, and who later became Vice-President; Henry Wheaton, later so prominent in American diplomacy and as a writer on international

⁹ Edwards to the President, June 22, 1824, enclosing his resignation of same date and saying he was undecided whether he should accompany it with an explanation of his reasons, MS. Dept. of State, Mex. Desp., I; same to same, same date, in Washburne, *The Edwards Papers*, 224-229, explains at length his reasons.

An amount equal to a full year's salary, \$9,000, had been advanced to Edwards to purchase an outfit, and the government experienced difficulty in getting him to refund. He finally agreed to repay two thirds, though he said he believed the government had no legal right to claim it. Adams to Edwards, Oct. 9, 1824, MS. Dept. of State, Instr., X, 213; Edwards to Adams, Nov. 10, 1824, MS. Dept. of State, Mex. Desp., I.

¹⁰ Adams, *Memoirs*, VI, 296-395.

law; Thomas H. Benton, who was urged for the place by Poinsett when Monroe first suggested the latter for it; and William H. Harrison, whom Clay favored for the place, who was himself anxious for it and had solicited and obtained many recommendations for it, and who was later appointed minister to Colombia.¹¹

The long neglected Mexican mission was filled almost immediately after the new administration began and less than a month after the long drawn out presidential contest had been brought to a close by the choice of Adams in the House of Representatives. On March 5, 1825, the next day after his inauguration, Adams sent for Poinsett and offered him the place. He, too, had been a supporter of Calhoun, now Vice-President, and his appointment had been considered when in the preceding summer the resignation of Edwards was imminent. In July of that year, Southard, of the Navy Department, had asked him confidentially if he was willing to go to Mexico, if he could go at once, and if his absence would affect the vote of his State in the coming election.¹² In November a long very cordial letter from a very intimate friend had closed with the statement: "As I perceive no appointment yet made for Mexico I cannot avoid hoping that if our presidential question can be fortunately adjusted, the one which we all desire may yet be made."¹³ In January, Monroe had offered Poinsett the place; but Poinsett urged Benton instead. The reasons for Poinsett's self-denial Adams discovered later. As soon as the House of Representatives had decided that Adams should be President the Calhounites began urging Poinsett for the office of Secretary of State to forestall the expected appointment of Clay; but in spite of the opposition, and in spite of the fact, which Adams and Clay foresaw, that it would give color to the "corrupt bargain" cry,

¹¹ Adams, *Memoirs*, VI, 413-415, 484-524; Lyman, *Diplomacy of the United States*, II, 484.

Obregon to Secretario, 2 de Febrero de 1825, MS. Rel. Ext., says in order to prevent the Mexican appointment from being regarded as a price for purchasing votes, it appeared that the post would be filled at once. He expected the appointment to go to Benton, or to Everett (later appointed to Madrid); but said nevertheless it may be that the project will prevail for sending Mr. Poinsett, a person known in Mexico.

¹² Southard to Poinsett, Navy Department, July 17, 1824, MS. Poinsett Papers, II, Pennsylvania Historical Society.

¹³ Stephen Elliot to Poinsett, Charleston, Nov. 16, 1824, MS. Poinsett Papers, II.

and in spite of the fact that Adams disliked Clay personally, this most important appointment at his disposal was given to Clay. This exalted position having eluded Poinsett's grasp, and having been assured that his nominee, Benton, would not get the position in any case, he was willing enough to accept. He did so on March 6, the next day after Adams had tendered him the appointment. Clay wished William H. Harrison to have it; but he had no objection to Poinsett.¹⁴ Two days later the appointment was confirmed by the Senate.

Probably no man in the country had the knowledge and experience which should so well qualify him for the place. At the time of his appointment he was a Congressman from South Carolina. He was a careful student and a polished gentleman. He had traveled extensively in Europe. In 1810 he had gone to South America with a commission from President Madison to report on conditions in Argentina and Chile, then just beginning their struggle for independence. In 1822 he went on a similar mission to Mexico, was favorably received, learned much of the country and people, and made an intelligent and, as events proved, a prophetic report to the State Department which was the principal reliance of the government in shaping its policy with reference to Mexico.¹⁵ In 1824, he published his *Notes on Mexico*, giving an account of his travels two years earlier and his comments on political conditions.¹⁶

¹⁴ Adams, *Memoirs*, VI, 484, 506, 522-524.

Obregon told his government, March 7, that, as he had formerly suggested might happen, Poinsett had been selected and would start early next month. Obregon to Secretario, 7 de Marzo de 1825, MS. Rel. Ext. Same to same, 28 de Marzo and 30 de Marzo, *ibid.*, tell of Poinsett's departure for Norfolk whence he would sail for Mexico. He was taking for Obregon to the Mexican Foreign Office a number of books and newspapers.

¹⁵ Poinsett's Report, MS. Dept. of State, Mex., Duplicate Despatches from Poinsett. This report covers sixty manuscript pages and is accompanied by an appendix of documents about equal in length. It begins with the Iturbidist movement in February of 1821; tells in considerable detail of the struggles between Iturbide and the legislative body, of the erection of the empire and of the ambition and stubbornness of the Emperor, and of the beginning of the movement against him; and closes in December, 1822.

¹⁶ Poinsett, *Notes on Mexico* made in the autumn of 1822, accompanied by an *Historical Sketch of the Revolution, and Official Reports*, 359 pages. See Zavala, *Ensayo Historico*, I, 241, which pays a tribute to Poinsett's astuteness in foretelling events. Brown's *History of Texas*, I, 81, gives a very incorrect account of Poinsett's career up to the time of his arrival in Mexico.

INSTRUCTIONS, ARRIVAL IN MEXICO, AND RECEPTION

In the instructions which Clay drew up on March 26, 1825, to govern Poinsett's conduct in Mexico, the latter was reminded of the great interest in and importance of his mission. Its purpose was "to lay for the first time the foundations of an intercourse of amity, commerce, navigation, and neighborhood which may exert a powerful influence for a long period upon the prosperity of both states." The fact is dwelt upon that the territory of the United Mexican States is coterminous with that of the United States, rendering the relations with them more important than with any other of the new states. He was told that in point of population, position, and resources, they rank among the first powers of America; and that their early history is not surpassed in interest by that of any other part of America. He was to bring to the attention of the Mexican Government the kindly feeling and sympathy with which the United States had looked upon the long struggle of the new states against the tyranny of Spain; the fact that the United States had recognized their independence at the earliest practicable moment and long before any other country had done so; and the message of President Monroe warning European governments against interfering in the affairs of the American states. He was to say, however, that the United States expected in return no special favors or privileges; but this government did expect that no such favors or privileges would be extended to any European power unless at the same time they were extended to the United States. He was asked to express the compliment felt by the United States that the Mexican states had copied so largely the federal constitution of the former; and was told to show an unobtrusive readiness to explain to the Mexican Government the workings of that constitution.¹⁷

¹⁷ Clay to Poinsett, Instructions, March 26, 1825, MS. Dept. of State, Instr., X, 225. Extracts from these instructions containing most of the facts given above are printed in *American State Papers, Foreign Relations*, V, 908, and VI, 278, and in *British and Foreign State Papers*, XIII, 485, under the date March 25. The autograph copy of these instructions in the archives of the American Embassy in Mexico bears the date March 25.

Only such portions of Poinsett's instructions are mentioned above as could have influenced his personal conduct in his relations to the Mexican Government. The instructions intended to govern his negotiations will be studied in connection with those negotiations.

It was Poinsett's over-enthusiastic belief in the absolute necessity of maintaining the federal form of government, when he found that centralizing tendencies in Mexico threatened its overthrow, which led him to engage in the activities that gave rise to the charges against him of meddling in the internal affairs of Mexico. And it was in this injunction of Clay's to show an unobtrusive readiness to explain to the Mexican Government the workings of the constitution that he could find the only excuse for his actions. Obregon wrote his government that Poinsett was pronounced in favor of the cause of the American continent and the republican system; that he had a good opinion of the state of Mexico; and that he was especially instructed to prevent England from being granted special favors in return for her tardy recognition. He told of Poinsett's visit to Mexico in 1822 and of his memoirs subsequently published; and inserted a line in cipher declaring, "in my conception he is not a person of great talents." ¹⁸

While this appointment had been knocked about as the football of politicians in Washington, American interests at the new capital were being neglected. The United States might have turned to good account the advantage she naturally gained by recognizing the independence of Mexico and other Spanish American states nearly three years before England took the same step. But when on May 5, 1825, Poinsett wrote from Vera Cruz giving notice of his arrival, he had to report that British agents had anticipated him in making a treaty. The commissioners

¹⁸ The cipher is as follows: " 26 en 315 mi 414 co 53 n 115 ee 33 p 118 to 552 no 551 es 321 pe 318 r 120 so 521 na 215 de g ra n de s ta le n to s 34 17 220 115 34 121 222 321 115 522 121. Obregon to Secretario, 30 de Marzo de 1825, MS. Rel. Ext.

C. C. Cambreling wrote Poinsett from New York, March 30, 1825, a friendly facetious letter saying among other things: "Make a good commercial treaty for us and take care that John Bull gets no advantage of you—if anything get the weather gauge of him. If you can get Texas for some of the lands of the poor Indians of the wilderness you will soon be a great man among us—or if you can contrive to make Cuba independent, protected by the United States, Mexico and Colombia, you have a fair chance and I wish you luck—for it is pretty much everything in political whatever it may be in other matters." This familiar comment probably reflected pretty closely what his friend knew to be Poinsett's own sentiments. The latter's actions with reference to the three matters here specifically mentioned, British influence, Texas, and Cuba, show that these playful injunctions did not fall on deaf ears, though his policy varied in detail from these suggestions.

from that country had arrived two months earlier, just about the time of Poinsett's appointment. The treaty was already concluded; the lower house of the Mexican Congress had already ratified it and he had no doubt the Senate would do so soon.¹⁹ American abstract recognition and philanthropic declarations had interested Mexico for a time and had elicited admiration and gratitude; but dilatoriness in opening communications had made American relations seem cold and Platonic. If England's advances had been long delayed they had been pressed with ardor when once begun, and had elicited an enthusiastic response. Herein was the beginning of Poinsett's troubles. At a later period many Mexican writers looking back to the time of Poinsett's arrival and firmly believing, though unable to produce conclusive evidence, that he was largely responsible for the confusion and disorders into which the country had fallen, alluded to his arrival as an unlucky or dismal day for the republic.²⁰

In Poinsett's letter of May 5, mentioned above, he announced that he would leave Vera Cruz the next day and proceed with all possible despatch to the capital. But the speed he made was of the Spanish variety. He reported that his reception everywhere was friendly. The attentions given him were not only respectful, but extremely kind. He was accorded military honors and every distinction. As customary he went to Jalapa and waited there for a reply to his note informing the government of his arrival.²¹ While at Jalapa he was informed that

¹⁹ Poinsett to Clay, Vera Cruz, May 5, 1825, MS. Dept. of State, Mex., Desp., I.

²⁰ The following quotation from the *Voz de la Patria*, II, núm. 7, 11 de Febrero de 1830, is typical of the bitterly prejudiced (but then, and for some time previous, generally believed), statements of the character and influence of Poinsett. Reviewing the history of the government during the time of Poinsett's mission, the writer says: "En este misma aciago dia, un correo extraordinario llegado de Veracruz avisó que había desembarcado Mr. Ricardo Joel Poinsett [sic], ministro plenipotenciaro de los Estados Unidos del Norte de América: al saberla el general Wilkinson que se hallaba en México, preguntó el que le anunció esta nueva, ¿que crimen habría cometido este desgraciado pueblo, que el cielo en su cólera le mandaba tal hombre para que le cause las mayores desgracias? Dentro de breve se cumplió este vaticinio."

²¹ Poinsett to Clay, Vera Cruz, May 5, 1825, as cited in note 19; and same to same, Mexico, May 28, 1825, MS. Dept. of State., Mex., Desp., I.

Governor Barragan to Secretario, Vera Cruz, 3 de Mayo de 1825, told of Poinsett's arrival and said provision had been made for his journey and his lodgment at Jalapa. A reply of 10 de Mayo approves the governor's conduct. Poinsett to Alaman, Sacri-

he would be expected to delay his entrance into the City of Mexico until the conclusion of a five days' religious festival which was being celebrated at San Augustin, a village just outside the capital. During the delay he lodged at the country home of Wilcocks, the United States consul, nearby, and visited the scene of festivity every day. The holidays, he reported, were celebrated by early mass and late orgies. From daylight to ten o'clock the churches were filled. At twelve all went to the cock-pit. The afternoon and night were passed in gambling, in which all ages, sexes, and conditions joined; and in dancing on the green as long as daylight lasted, then after dark in the cock-pit. It was in the cock-pit that he had the honor of meeting two members of the cabinet, the Secretary of State and the Secretary of the Treasury. He entered the capital on May 25.²² Next day he announced to Alaman his presence and asked for an opportunity to present his credentials. Alaman replied May 27, appointing June 1 for Poinsett's reception by the President.²³

On the day preceding Poinsett's reception the British chargé, Ward, was formally received by President Victoria. On that occasion the latter had emphasized the importance of Great Britain's recognition of Mexican independence, alluded to the English as "that great people who sustain the liberties of the world," and said he had every reason to believe that the friendship of the two nations would be perpetual. In Poinsett's report to Clay he said that in view of this speech he thought it necessary to set the conduct of the United States toward these countries in its true light; and in a cipher paragraph added: "It is manifest that the British have made good use of their time and opportunities. The President and three of the Secretaries—those of State, Treasury, and Ecclesiastical Affairs—are in their interest. We have a very respectable party in both houses of Congress; and a vast majority of the people are

ficios, May 4, 1825, gives official notice of his arrival. A reply of 10 de Mayo acknowledges Poinsett's note, encloses a passport for him to continue his journey to the capital, and tells him that orders had been given providing for the security and comfort of the trip. Alaman to Governor of Puebla, 10 de Mayo, instructs the latter to provide for Poinsett. A reply of 15 de Mayo says the order had been received and complied with, and Poinsett had just arrived. All these are in MSS. Rel. Ext.

²² Poinsett to Clay, May 28, 1825, as cited in note 21.

²³ Poinsett to Alaman, May 26, 1825, and Alaman to Poinsett, 27 de Mayo de 1825, MSS. Rel. Ext.

in favor of the strictest union with the United States. They regard the British with distrust." In the speech which he felt called upon to make at his own presentation next day, Poinsett seized the opportunity to say, as Clay had instructed, that it was peculiarly flattering to the United States that a constitution so similar to their own had been adopted by Mexico. Then he dwelt upon the sympathy with which the government and people of the United States had watched the progress of the movement toward independence; told of the recognition of that independence within less than a year after it was declared; and mentioned the subsequent declaration against any attempt of any European government to deprive them of independence. In these steps, he reminded them, the United States had taken the lead; and now the freest government of Europe had followed. President Victoria's brief reply was respectful, but entirely non-committal and lacked the enthusiasm which marked his speech to the British representative the preceding day.²⁴ Thus early Poinsett began definitely to endeavor to exert an influence on the Mexican Government and counteract what he thought was undue English influence. It is clear, however, that he did this not for his own pleasure or profit, nor even for the benefit of the United States, but for the good of Mexico especially, and incidentally for the advantage of all the free governments of America as opposed to the despotic system of the European powers.

BRITISH INFLUENCE DISPLACED BY AMERICAN

In Poinsett's mind he early divided all Mexicans into two classes, those friendly to the American system championed by the United States,

²⁴ Poinsett to Clay, June 4, 1825, enclosing a copy of the speech of President Victoria to the British chargé, May 31; Poinsett's address of June 1; Victoria's reply to the last of same date; Wilcocks to Poinsett, May 12, 1825; and Poinsett's reply to the last of May 15, arranging the reception ceremonies; all in MSS. Dept. of State, Mex., Desp., I. Poinsett's address and Victoria's reply are printed in Bocanegra, *Memorias para la Historia de Mexico*, I, 379-382. A copy of Poinsett's speech in English with a Spanish translation are in MSS. Rel. Ext. With them is Poinsett's credential letter dated March 14, 1825, and signed by J. Q. Adams and H. Clay. An account of these receptions in *Voz de la Patria*, II, núm. 7, compares Ward with Poinsett, complimenting the latter's linguistic ability, but casting reflections on his character: "El dia primero de Junio hizo lo mismo Mr. Poinsett, enviado de Norte América: su arenga estuvo mejor dicha que la del de Inglaterra, y mas larga,

and those friendly to the European system championed by England. In a cipher paragraph of a letter to Clay of August 5, 1825, he said the President of Mexico was a weak man and was controlled by his ministers, especially the Secretary of State and Secretary of the Treasury. The former (Alaman) was a man of good natural talents and better educated than was common among men of his class in Mexico. He was director of an English mining company and consequently favored British interests. The latter (Esteva) was a man of tolerable ability but without education. He was attached to England because Englishmen of means loaned the government money to help him out of his official difficulties. From this, English influence had profited enormously. These opinions, he said, were not the result of the treatment he had received, for that had been only the most friendly. On the other hand he added: "There is an American party in the House of Representatives and in the Senate, in point of talents much the strongest; but the government have an ascendancy over both bodies."²⁵

On September 24, Clay replied that the prevalence of British influence in Mexico was to be regretted; but that it could hardly be made the subject of formal complaint if it were merely the effect of British power and British capital fairly exerted, and if not rewarded by favors to British commerce or British subjects to the prejudice of American. But, he added, against any partiality or preference to any foreign nation to the disadvantage of the United States Poinsett was to remonstrate.²⁶

Before this cautious advice could reach Mexico a sort of palace revolution had occurred. The strongest British sympathizers had left the cabinet and those who remained, as well as President Victoria, were entirely favorable to the United States. Poinsett was in high favor. How it happened is told in a letter to Clay of October 12, 1825, all in pues posee el idioma español muy regularmente por desgracia nuestra, para causarnos infinitos males."

²⁵ Poinsett to Clay, Aug. 5, 1825, MS. Dept. of State, Mex., Desp., I. The brief paragraph quoted above telling of the American party appears in the copy of the letter in the volume of Duplicate Despatches but not in the regular volume.

²⁶ Clay to Poinsett, Sept. 24, 1825, MS. Dept. of State, Instr., X, 225. This paragraph is not contained in any of the printed extracts from this letter. This letter of Clay was written before he had received Poinsett's of August 5. That came to the State Department October 3.

cipher and covering twelve pages. Poinsett began by telling how England had secured her overwhelming influence. In 1823, after the overthrow of Iturbide, Victoria had met the unofficial British agent, Dr. Mackey, who had proposed that Mexico should offer certain commercial privileges to Great Britain in return for British recognition. A Mexican agent was thereupon sent to London to invite that government to send commissioners to treat, hinting that they might expect privileges. In response to this invitation the commissioners had come and had concluded a treaty. Victoria thus considered the establishment of friendly relations with England his own work. A flattering personal letter from Canning had further bound him to the English cause. He further said the English commissioners had won over Tornel, the President's secretary, whom Poinsett calls "a vain and venal man," and further on, "a very bad man without a single redeeming quality," and believed "to be in the pay of the British chargé d'affaires." He exercised a great influence over Victoria. So did Alaman, the Secretary of State, and Esteva, of the Treasury. These three had concocted a scheme to introduce into the cabinet the Bishop of Puebla, a European Spaniard, whose influence was dangerous to these countries; but counter-influence prevented the appointment and set about an attempt to induce the President to dismiss Alaman. The British chargé, Ward, because of personal pique at Alaman, exerted his influence to the same end. Alaman, learning of the combination against him, resigned. Then came the revolution. Esteva had already deserted Alaman and, Poinsett continued, "hastened to assure me of his earnest desire to see our countries united and an American system formed on the principles he knew I had at heart. * * * Esteva is a man of great activity and of some talents; he came over to the American party only because he perceived the impossibility of sustaining himself independently of it." Victoria's attitude also suddenly changed. Of him Poinsett said, "The President sent me word that he wished to have an interview with me, and notwithstanding I requested him to appoint a time convenient to him to receive me, he insisted on coming to me. Our interview was very friendly and in the course of it he gave me repeated assurances of regard for the United States and of his American sentiments. The President is a very good man with no bad dispositions, but he is very vain and is badly

surrounded." It had been suggested to Poinsett that Victoria's attachment to England sprang from a hope that Great Britain might assist in placing a Mexican on the throne of Mexico to prevent other powers of Europe from placing a member of some of their royal houses on the throne. Poinsett thought the President was unwilling to leave office; but the constitution forbade his reëlection, which under the circumstances was a dangerous provision. He declared that Victoria was not and never would be a real friend to the United States. He had become reconciled to Poinsett but disliked him. The man who had suggested Victoria's dynastic ambition and had been most influential in ousting Alaman and effecting this change in the sentiments of the executive was Arispe, a daring and intriguing man of talents professing a zeal for America and declaring himself anxious to promote Poinsett's views. He had been useful but Poinsett did not repose entire confidence in him. Neither did he feel any confidence in Esteva, for, he said, "on the very day that he declared himself to me he told the grossest falsehoods of me to Mr. Ward, which occasioned in great measure the difference between that gentleman and myself. The state of society here is scarcely to be credited. I hardly know a man however high his rank or office whose word can be relied on." Poinsett declared he would have kept aloof from such men, but he had found it necessary to form a party out of such elements as the country afforded, or leave the English complete masters of the field. The friends of the latter country were alarmed, and could not conceal their mortification or fears. Ward had sent a messenger to Canning with most exaggerated accounts of Poinsett's influence. The latter adds, "His want of tact and overwrought exertions may contribute to establish that influence he so much dreads." In conclusion Poinsett explained that "The country is tranquil and I see no cause to fear any convulsion except that in a republic without virtue and with a large standing army there is always danger."²⁷ This despatch was dated almost three weeks after the ministerial crisis had occurred.²⁸

²⁷ Poinsett to Clay, Oct. 12, 1825, in cipher covering twelve pages, MS. Dept. of State, Mex., Desp., I.

²⁸ Resignation of Alaman, 23 de Septiembre de 1825, and acceptance of same 27 de Septiembre de 1825, MSS. Rel. Ext. Zavalá, *Ensayo Historico*, I, 342.

To counteract Ward's report to Canning, Poinsett had written to Rufus King, the United States minister in London, telling the circumstances that had occurred in order that King might be able to give any explanation that might be needed. In the letter to King he explained that Ward had been forming a European party, which activity had resulted in identifying Great Britain's policy with that of the other European powers.²⁹

In his long cipher despatch to Clay, Poinsett practically claims to have brought about this change in the government through the group of men which he alludes to as an American party. Its purpose was to resist the centralizing tendency and preserve and perpetuate the federal form of government, to which Poinsett was so strongly attached and which he believed was the only hope for preserving free government in Mexico. Four years later in referring to his part in effecting this peaceable democratic revolution, Poinsett explained that the cordiality of the democratic party, his own principles, and the hostility of the aristocratic party all tended to cause him to seek his associates among the popular party. He believed England was making efforts to obtain a dominant influence in Mexico as she had in Portugal. He believed too that this would be detrimental to the interests of the United States. Learning that the democratic party intended to effect a revolution by force to get control he advised them to use the more moderate measures of organization, use of the franchise, and establishment of their own press. They took his advice and were eminently successful.³⁰

Poinsett's dislike of Tornel, the President's secretary, reflected in his report of October 12, above, was heartily reciprocated by the latter. He did all he could to counteract Poinsett's influence at the time. And in a book which he published several years later he spoke of the minister's arrival as an ill-fated hour for the republic; reviewed his career and acknowledged his ability, told of his attracting to himself little by little persons possessed of state secrets and from them organizing a party, exciting their natural animosities against their rivals; and characterized

²⁹ Poinsett to Rufus King, Oct. 10, 1825, enclosed with Poinsett to Clay, Oct. 12, 1825, cited in note 27.

³⁰ Poinsett to Secretary of State, March 10, 1829, MS. Dept. of State, Mex., Desp., IV.

his actions as conduct so foreign to the circumspection of a diplomat.³¹ Alaman, too, was bitterly hostile toward Poinsett, as might have been expected, and later declared that Poinsett planned to remove the aristocratic influence from the government to substitute not a democracy, for that was impossible in a country in which the mass of the people took no part in public affairs, but the uncontrolled domination of a few ambitious individuals of less respectable connections.³² The testimony of both of these is decidedly prejudiced, but it expresses a feeling that later became almost universal. And although Poinsett did what he felt was for the good of the country, it must be admitted that from the standpoint of Tornel, Alaman, and others of their faction, there was some justification for their violent hostility to him, even if there was no other ground on which to base their charge that he meddled in Mexican internal affairs than Poinsett's own account, studied above, of the way the change in the government was effected. On the other hand, it is certain that Poinsett's belief was not unfounded that England was trying through Ward to exert an influence hostile to the American system, which had been enunciated by Monroe and was now championed by Adams and Clay and accepted by Poinsett as the guiding principle of the relations of the American states.³³

The influence which Poinsett was so pleased to see in control of affairs remained dominant. Some three months later he reported to Clay that the executive had openly avowed a change in policy from the centralista party to the federalista. His agency in bringing about the change, he said, had drawn upon him the odium of the centralistas. They were declaring, he continued, his purpose to be to gain such an influence that the government would consent to any proposal he might make regarding limits.³⁴ Not only was this not true; but events proved that if it

³¹ Tornel, *Breve Reseña Histórica*, 38.

³² Alaman, *Historia de Méjico*, V, 823.

³³ See Temperley, *The Later American Policy of George Canning*, American Historical Review, XI, 779-797, the object of which article is to show that this policy "was intended to defeat certain claims and pretensions of the Monroe doctrine." Much interesting light remains to be cast on this matter of the conflicting interests of England and the United States at the Mexican capital and the conflicting intrigues of Poinsett and Ward, by a careful study of Ward's correspondence with his government while chargé in Mexico.

³⁴ Poinsett to Clay, Jan. 4, 1826, MS. Dept. of State, Mex., Desp., I.

had been true Poinsett failed signally in his purpose. What Poinsett really did toward bringing about this change was known only to the few most intimately concerned and most interested in keeping it secret. Some things, however, became known, for, Poinsett said, "there are no secrets in Mexico." The uninitiated naturally suspected much more than existed; hence the criticisms and attacks that shortly began so seriously to embarrass Poinsett.

POINSETT'S RELATIONS WITH THE YORKINOS

There was one matter in which Poinsett was involved that became public immediately. That was the organization of the York rite Masons which at once began political activities and soon dominated the country. Masonry was already flourishing in Mexico in spite of clerical opposition; but all of the lodges hitherto officially organized belonged to the Scottish rite. Their secrecy made them a fertile field for political intrigue. The centralista faction dominated them everywhere, and their influence was reactionary. The federalista faction felt that it was necessary to oppose them to prevent a return to a monarchical system. Just at the time when the changes were occurring in the government which Poinsett spoke of as the organization of an American party, and when that party was getting control of the cabinet, lodges of York Masons began to be organized. In his correspondence at the time Poinsett did not hesitate to acknowledge that he had a part in their organization. In a letter of October 14, 1825, to Rufus King in London, he said he had encouraged and assisted in the organization of them and had entertained the members at his home. The meeting had been reported to Ward by Tornel as having been entirely political; and that gentleman had been given a false notion of the toasts. Subsequently Ward had given a diplomatic dinner to the Secretaries of State and foreign ministers to which he had not invited Poinsett. At this dinner Ward's friends had indulged in toasts allusive to pending negotiations between the United States and Mexico not of a very friendly tenor, and those toasts had been published at Ward's request. The factions which Poinsett classes as the enemies of the government,—the European Spaniards, the Bourbonists, and the centralistas,—had been displeased, he said,

at the good understanding that had hitherto existed between the representatives of England and the United States, and had worked on Ward to break it up. In closing, Poinsett said he would await information from King concerning opinion in London about Ward's activities before he attempted to retaliate for the insult which he felt Ward had offered.³⁵

Poinsett did not say the purpose of the movement was political, neither did he say that it was not, although he said that it had been reported to have been such. The fact that the organization was effected at the very time that he was forming what he repeatedly spoke of as an American party, and that the leaders of that party were also leaders in the lodges, is presumptive evidence that he had some notion of the use to which they would be put. But later when the Yorkinos had enjoyed a phenomenal growth and when the names of the old centralista and federalista parties had everywhere been abandoned for the respective designations, Escoceses (Scots) and Yorkinos, he said, in August of 1826, that he was sorry the Masonic meetings had become political. But he suggested an excuse for the faction which he favored by saying that the Escoceses had long existed and been hostile to the United States before the Yorkinos were organized.³⁶ Two months later he reported that the elections which had just taken place for members of the State legislatures had gone generally in favor of the Yorkinos. The legislature of the State of Mexico, hitherto controlled by the Escoceses, all of whom had been defeated in the election, refused to yield their seats to their victorious rivals. Thus triumphant in the State elections of 1826, the Yorkinos planned already to capture the presidency two years later; and Poinsett knew their plans. In a cipher paragraph of this despatch of October 21, 1826, he said: "The man who is held up as ostensible head of the party and who will be their candidate for the next presidency is General Guerrero, one of the most distinguished chiefs of the revolution. Guerrero is uneducated but possesses excellent natural talents, combined with great decision of character and undaunted cour-

³⁵ Poinsett to Rufus King, Oct. 14, 1825, MS. Dept. of State, Mex., Desp., I.

³⁶ Poinsett to Clay, Aug. 26, 1826, MS. Dept. of State, Mex., Desp., II. In this he said there was a third party called Los Piadosos, opposed to all Masonic influence, but that it received almost no support. In January he had written that Masonry was flourishing and that, except the President, all the cabinet and all the leading men in the country were Masons, even some of the higher clergy being members.

age. His violent temper renders him difficult to control, and therefore I consider Zavala's presence here indispensably necessary, as he possesses great influence over the general." He had just told of Zavala's having been offered the position of Mexican minister to the United States and said: "I was not sorry that he declined it; he is one of the most efficient leaders of the party friendly to the United States, the Yorkinos, and is more useful here than he would be in Washington." He told of the schemes of those in the cabinet who were endeavoring to rid that body of the Yorkino dominance, said they exercised great influence over the indecisive character of the President, and declared that if their schemes succeeded that official would find himself, as before Poinsett's arrival, surrounded by a few supporters hostile to the majority in Congress and the country.³⁷ A month later he reported that there were election disturbances; but that he did not expect a violent rupture, and was using every effort on his part to prevent such.³⁸

On July 8, 1827, in explaining to Clay the attack of the legislature of the State of Vera Cruz upon him, studied below, Poinsett said the most serious charge made against him was that he had established the York Masons; and explained to Clay just what part he had in their organization. He regretted that Masonry should have been made an instrument of political intrigue. He said lodges of York Masons had already existed in Mexico before his arrival; but that they were without charters. Members of these had asked him to secure a charter from the grand lodge of New York, which he had not hesitated to do. The persons who made the request were all members of the government or interested in maintaining the existing order of things and in preserving the tranquility of the country. He said they were General Guerrero, a distinguished revolutionary officer; Esteva, Secretary of the Treasury; Arispe, Secretary of Grace and Justice; Zavala, a member of the Senate and later governor of the State of Mexico; and Alpuche, a member of the Senate. He said he had no thought that such men had in view any project to disorganize the government. As soon as the Yorkinos were publicly accused of perverting the organization to political purposes,

³⁷ Poinsett to Clay, Oct. 21, 1826, nearly all the facts here given being in cipher, MS. Dept. of State, Mex., Desp., II.

³⁸ Poinsett to Clay, Nov. 15, 1826, MS. Dept. of State, Mex., Desp., II.

he said he withdrew from their meetings. Again he excused them by saying the Scottish rite Masons had long been organized, and their opponents had only followed their example in political activity. He said further that the progress of the Yorkino cause had been so rapid as to lead the people to attribute it to some secret cause. They see in this "the direction of some able hand, and have thought proper to attribute the success of the republican party, the consolidation of the federal system, and the establishment of liberal principles exclusively to my influence."³⁹

Zavala, to whom Poinsett referred as friendly and so useful and a leading member of the Yorkino lodge, later published a brief account of the formation of the lodges. He says the project was formed by Alpuche and joined by Esteva, Arispe, Victoria and others; that its purpose was to oppose the Escoceses; that five lodges were formed; and that Poinsett was then asked to obtain for them a charter from the grand lodge of New York. This step and the installation of the grand lodge in Mexico, he says, was the only interference by this American, who, he continues, because of his share in the movement has been calumniated by aristocrats and various European agents in Mexico who have taken more part than he in the affairs of the country.⁴⁰ Tornel, the bitter enemy of Poinsett, gives an account as prejudiced against him as Zavala's is in his favor.⁴¹ Nearly every writer on Mexican history of this period expresses an opinion on Poinsett's merit or demerit in the matter. Most of these writers have followed either Tornel or Zavala, and show their prejudice either for or against him.⁴²

³⁹ Poinsett to Clay, July 8, 1827, MS. Dept. of State, Mex., Desp., III.

⁴⁰ Zavala, *Ensayo Historico*, I, 346. This was published in 1831. *Ibid.*, 385, says, "los periodicos del otro bando le acusaban de haber faltado á la primera obligacion de un ministro extrangero, que es la de no mezclarse en las cuestiones interiores del pais en que egereen su mision, y en donde no estan de consiguiente sujetos á las leyes comunes. La acusacion en el fondo era injusta." *Ibid.*, 339, pays a glowing tribute to Poinsett's ability and acknowledges his uninterrupted friendship, which shows of course that he is a prejudiced witness.

⁴¹ Tornel, *Breve Reseña*, 45.

⁴² Accounts bitterly condemning him are: Alaman, *Historia de Mexico*, V, 822, 824; Bocanegra, *Memorias para la Historia de Mexico*, I, 382, 389-395; *ibid.*, II, 13, 17-22; Rivera, *Historia de Jalapa*, II, 366-369; and Zamacois, *Historia de Mexico*, XI, 620. H. H. Bancroft, *History of Mexico*, V, 32, quotes Zavala and exonerates Poinsett.

VERA CRUZ MANIFESTO AGAINST POINSETT'S INFLUENCE

In the latter part of June, 1827, Poinsett was publicly and violently arraigned in a long manifesto issued by the legislature of the State of Vera Cruz. It declared that "a sagacious and hypocritical foreign minister as zealous for the prosperity of his own country as inimical to ours," being jealous of Mexican prosperity which would soon eclipse that of his own country, and jealous also of the friendly relations of Mexico with Great Britain which might prove disadvantageous to the interests of the United States, had established the York Masons, a hundred times more dangerous than twenty battalions of the tyrant of Spain. For an invading army would be met as an enemy by a united country; but the Yorkinos had been organized to destroy the Escoceses and the consequent internal dissensions were diffusing a want of confidence throughout the country, dividing it against itself. It declared that the Escoceses well deserved destruction for their ambition and centralist tendencies; but that many moderate men of that faction had been displaced that their positions might fall to their more ambitious opponents. It declared both Yorkinos and Escoceses injurious, and demanded the enforcement of laws already existing which prohibited all Masonic associations.⁴³

A short time after this violent attack Poinsett published in Spanish a pamphlet which he called "An Exposition of the policy of the United Romero, *Mexico and the United States*, 349, says, "it seems that while he desired the success of the Yorkinos, he was not the founder of that lodge." Robinson, *Mexico and her Military Chieftains*, shows his lack of accuracy by saying, p. 146, "Mr. Poinsett, it may be presumed, never had any connection with either branch of the order in Mexico." McMaster, *History of the People of the U. S.*, V, 540, states correctly but briefly the part Poinsett took in organizing the lodges. Yoakum, in *Comprehensive History of Texas*, I, 124, gives a brief and substantially correct statement.

⁴³ "Manifesto of the Congress of Vera Cruz to the Mexican Nation," June 19, 1827, translation covering 26 manuscript pages, enclosed with Poinsett to Clay, July 8, 1827, MSS. Dept. of State, Mex., Desp., III. A copy printed in Spanish is in the volume of Duplicate Despatches. It declared also that many Iturbidists were members of the York lodges and their purpose was to bring about the return of the empire with Iturbide's son at its head. This Poinsett considered too absurd to need argument. It is a fact that Iturbidists later coöperated with the Yorkinos; but that was probably due to the fact that the Bourbonists coöperated with the Escoceses.

States toward the Republics of America," replying to the charges in the manifesto. It argued the uniformly friendly policy of the United States and of himself for Mexico, and declared that far from being inimical to the prosperity of Mexico or the other republics the United States "are desirous to see their neighbors wealthy and powerful in order that they may be more efficient allies and more profitable customers." He quoted from a discourse which he had himself pronounced in favor of the recognition of these states, in which he had expressly refuted the argument that their prosperity would hurt the United States. Further, the United States were far from thinking the friendship of Great Britain for Mexico injurious to them. On the contrary, the United States invited Great Britain to join them in recognizing the new states; and when that was not done urged Great Britain to follow their example, and rejoiced when she did. In answer to the charge that he was controlling the prevailing party in the federal government, he argued that the vexatious delays in his negotiations proved the falsity of it. He declared that he had had no part in the perversion of the Masonic lodges to political purposes, and that since they had been so perverted he had withdrawn from their meetings. He declared that he had not interfered with the internal concerns of the country unless advocating the superiority of republican institutions and explaining the workings of United States institutions be considered as interfering.⁴⁴

In a long letter of July 8, 1827, Poinsett explained to Clay the situation and the events that led up to it. He said he had abstained from demanding satisfaction for this unprovoked and unjustifiable insult because the State of Vera Cruz had recently committed acts of rebellion against the sovereignty of the federal government and was then maintaining a defiant attitude. There was hardly any way short of civil war that the federal government could have forced the state to give satisfaction. If he had demanded satisfaction and had not promptly received it, he would have been compelled to demand his passports and

"Poinsett's "Exposition of the Policy of the United States toward the Republics of America," dated July 4, 1827, enclosed with Poinsett to Clay, July 8, 1827, MSS. Dept. of State, Mex., Desp., III. A copy printed in Spanish is in the volume of Duplicate Despatches. It is also on the market in pamphlet form, though rare. English translations of it were printed in various newspapers of the United States at the time. The manuscript copy covers 16 pages.

leave the country, placing the United States and Mexico in collision, which he thought the governing faction in Vera Cruz desired. He regretted that the legislature of Vera Cruz had thus violated the law of nations and every principle of decency and good faith by publishing suspicions derogatory to the character of a friendly nation and the reputation of a foreign minister. But they were also guilty of violating the federal constitution. The maintenance of the federal form was sure to involve the central and local governments in disputes concerning sovereignty. The other States were giving proofs of attachment to the federal government and the State would have to submit. The general government had lamented the attack but was slow in acting and hitherto had lacked the energy to make itself obeyed in the State of Vera Cruz. He said the errors of Mexico ought to be viewed with indulgence. Their long period of political tutelage to Spain and their lack of experience in dealing with foreign nations was their only excuse. It was not strange that they should confuse the duties and rights of different organs of government. He said he had always made every effort to show the friendly disposition of the United States, and rendered cheerful service to those who applied for advice or assistance in the framing of laws or in understanding the working of constitutional principles. He had uniformly exhorted them to submit to any temporary evil rather than resort to violence. This conduct had drawn upon him the odium of those who sought to overthrow liberal institutions. The necessity for thus defending his conduct was painful, he said, but there was no alternative.⁴⁵

Before this explanation had been received at Washington, Sergeant had returned from Mexico, where he had gone to coöperate with Poinsett in the mission to the Congress of Tacubaya, the unsuccessful attempt at a continuation of the Panama Congress of the preceding year.

⁴⁵ Poinsett to Clay, July 8, 1827, MS. Dept. of State, Mex., Desp., III. This letter covers 20 manuscript pages. Much of it is occupied with a review of the origin, composition, and principles of the Scottish party, and of the part he had taken in the organization of the York Masons, and the political activities of the Yorkinos to counteract that of the Escoceses. See above.

Rivera, *Historia de Jalapa*, II, 426, gives a brief study of the Vera Cruz Manifesto and the attendant rebellious movements in the State of Vera Cruz; most of the other Mexican historians cited in notes 40-42, above, discuss the manifesto.

President Adams entered in his diary on August 1, the statement that "Mr. Sergeant thinks not favorably of the proceedings of Mr. Poinsett during his residence in Mexico." Adams also says that Sergeant had handed him a private letter from Poinsett in which the latter said he had received an intimation from the President of Mexico that his recall would be demanded.⁴⁶ Obregon wrote his government that, in a conference some time in August, Clay had expressed disapproval of Poinsett's conduct in so far as he had mixed in the internal affairs of the country. When the news of the Vera Cruz attack first arrived, about the middle of August, the *National Journal* had expressed the same sentiments as Clay; but on August 31 the *National Gazette* had praised Poinsett's conduct, and a few days later both the *National Intelligencer* and *National Journal* approved it. Consequently Obregon thought the government must have received further information convincing them that Poinsett's conduct was excusable, since one of these papers was official and the others were supporting the administration. The action of the legislature of Vera Cruz was looked upon as revolutionary, he said, and as showing a lack of respect for the federal government. It had been intimated to him that Poinsett would probably be recalled in spite of the approval of his conduct.⁴⁷ It was on August 31 that the Department of State received Poinsett's letter of July 8 with the enclosed manifesto and his answer.

But Adams and Clay did not act precipitately nor enthusiastically in exonerating Poinsett. It was more than ten weeks after receipt of his explanation before they passed judgment. On November 19, 1827, Clay wrote Poinsett that the President approved his conduct and did not consider that he had interfered in the politics of Mexico, since no complaint had come from the Mexican Government of his conduct. It was thought best to make no formal complaint of the act of the Vera Cruz legislature; but Poinsett was asked to remonstrate informally to the President of Mexico, and say that if that government had any complaint to make concerning Poinsett the Government of the United States was ready to receive such in the regular manner. The President did not desire the termination of Poinsett's mission: but if his position had

⁴⁶ Adams, *Memoirs*, VII, 312.

⁴⁷ Obregon to Secretario, 13 de Septiembre de 1827, MS. Rel. Ext.

become unpleasant and he desired to return he might. It had been rumored, he was told, that he would return. The matter was left entirely to his own feelings and discretion.⁴⁸

POINSETT'S POLITICAL INFLUENCE, AND THE MONTAÑO REVOLT

The Yorkino party, which had come into existence in 1826 and which before the end of the year had grown so strong as to carry most of the State elections, continued to grow and retained its influence. The Escoceses, unable to retain or regain influence and still attributing the growth and power of their opponents to the magic influence of Poinsett over the government and the Yorkino lodges, resorted first to innuendo and then to violence. Zavala, who was a Yorkino, says that in the papers which they established they declared with as much ignorance as impudence that so long as the Escoceses had control the government was tranquil and prosperous; but as soon as the Yorkinos attempted to take part disorder and anarchy prevailed. He says this is the argument of the tyrant who has monopolized power and wishes to keep it from the people. Just so, he continued, the King of Spain argued that so long as Spaniards were allowed to rule and the natives did nothing but obey all was quiet; but as soon as the natives began to assert their rights the struggle began and peace vanished.⁴⁹ The Yorkinos also published papers to advocate their cause, and these became the objects of suspicion and attack from their opponents, who declared they were sub-

⁴⁸ Clay to Poinsett, Nov. 19, 1827, MS. Dept. of State, Instr., XII, 36.

⁴⁹ Zavala, *Ensayo Histórico*, I, 354. In the preceding seven pages he reviews the party strife. The tone of these newspaper criticisms of Poinsett and the government supposed to be dominated by him is indicated in the following extracts from the *Voz de la Patria*, II, núm. 8, 15 de Febrero de 1830: "No afligan menos la Pátria los males políticos que ya comenzaban á manifestarse, y cuyo origen fontal se debe casi exclusivamente á la instalación de las lógiás de los yorkinos en México. * * * Poinsett, el regulador y árbitro de este establecimiento, de que se ha llamado Sumo Pontífice, muy luego procuró sacar todo el partido posible para llenar sus objetos principales; á saber, destruir nuestra República, y engrandecer la del Norte América, por ser on [en] su concepto incompatible la existencia de ambas. * * * La mano artera de Poinsett, movía á su placer los hilos de esta trama: este hombre insidioso de la humanidad, y cuyo nombre hace temblar á las repúblicas de Chiloe y Buenos-Aires, de donde fué lanzado como una mala y dañina bestia."

sidized by Poinsett and working for the interests of the United States as opposed to those of Mexico.⁵⁰

On November 10, 1827, Poinsett reported to Clay an act which it is difficult to see how he could have defended from the charge of interfering in Mexican politics. As has been shown, Guerrero had been closely associated with what Poinsett frequently alluded to as the American or democratic party. He was also a member of the Yorkino lodges, an active spirit in their organization, and practically the head of the order. In October of 1826 Poinsett had predicted that Guerrero would be the Yorkino candidate for the next presidential election. He now proceeded to assist in making his prophecy come true. Against the wish of his friends in the government, Guerrero had declared that he was going to join the movement, at the time becoming popular, for expelling from Mexico all remaining European Spaniards. These friends appealed to Poinsett to persuade Guerrero to abandon his designs, and to await patiently the effect of his friends' efforts to have him elected next year as successor to Victoria. He had written the desired letter, Poinsett told Clay, and President Victoria had thanked him for writing it. Guerrero had replied in a tone of great intimacy, modestly declaring his unfitness for the high office which Poinsett had thus informed him his friends wished him to become a candidate for. Poinsett virtually admits that this was improper interference, because he tells Clay he wishes President Adams to understand that he had never taken any step toward interfering in the affairs of Mexico "without the knowledge and consent and generally at the solicitation of the government."⁵¹ If the government had been as subservient to Poinsett as his critics supposed it to be, he would have had no difficulty in obtaining their consent. It was the suspicion that he and the govern-

⁵⁰ Aviraneta, a European Spaniard traveling in Mexico, was told in Vera Cruz "que el Mercurio es un periódico subencionado por Poinssete [sic] enviado de los Estados Unidos: es un periódico yorkino, para promover la expulsión de los comerciantes y propietarios Españoles del territorio del república, y substituir la influencia del pueblo Yanki." See Aviraneta é Ibargoyen, *Memorias Intimas 1825-1829*, in D. Luis García Pimentel, *Documentos Historicos de Mejico*, III, 45. *Ibid.*, 58 says: "Los escritores del Mercurio son hombres vendidos al oro que desparrama Poinsset [sic] á manos llenas, entre los incautos mejicanos." Martinez, *Sinopsis Historica de las Revoluciones*, I, 58, gives a brief outline account of the party struggles.

⁵¹ Poinsett to Clay, Nov. 10, 1827, MS. Dept. of State, Mex., Desp., III.

ment were in accord that occasioned their most serious criticism. But from the tone of Poinsett's letter to Clay it is evident here, as in other cases where his acts might be considered of doubtful propriety, that he was doing what he believed for the good of Mexico, and thought necessary to prevent the country from suffering serious evils which he thought he foresaw.

The danger which he and Guerrero's friends foresaw this time was a real one. Within less than a month he reported that there had been insurrectionary movements in Puebla and Vera Cruz the purpose of which was to force those States to expel the European Spaniards. In the latter State it had accomplished its purpose immediately, the legislature yielding without resistance; but in the former it had resulted in bloodshed. These and similar movements elsewhere were being promoted by a secret society that had been organized for the purpose by leading members of the Yorkino party and modeled on the Italian Carbonari. The new organizations had spread rapidly and virtually controlled the whole country. They would manage the election of Guerrero in the coming campaign.⁵²

Disturbances rapidly developed. Party controversy became more bitter. Poinsett reported on January 9, 1828, that the Escoceses, despairing of regaining their influence by peaceable means, had appealed to arms. He confesses that he had not foreseen this conflict because he did not think the leaders of that party would be so rash. On December 23, preceding, the Plan of Montaño had been proclaimed and a revolution started to force its adoption. The Plan contained four demands. The first was the extermination of all secret societies. The second was the dismissal of certain ministers. The fourth was the maintenance of the existing constitution and laws. But the principal demand was the third, which was aimed directly at Poinsett and declared: "The Supreme Government shall, without an instant's delay, furnish the envoy of the United States to this Republic with his passports to leave the country." The fourth demand is the stock argument of the revolutionist that he is not trying to destroy the government or the laws but

⁵² Poinsett to Clay, Dec. 8, 1827, MS. Dept. of State, Mex., Desp., III. He said an act for the expulsion of the Spaniards was before the lower house of the National Congress and would probably pass.

to maintain them. The second grew out of the belief that the ministers were the tools of Poinsett and working for the interests of the United States. The purpose of the first was the destruction of what was considered a gigantic organization which enabled Poinsett and his friends to dominate the country. Thus the other three demands grew out of and were but corollaries to the third, the ostensible purpose of which was to rid the country of what was felt to be the baneful influence of the American minister. As a matter of fact it was of course the desperate effort of a disappointed and despairing political faction to regain control by voicing what was thought to be a popular demand. But they were mistaken in the strength of their cause, although at first it seemed formidable and had high official sanction. Nicholas Bravo, the Vice-President, and titular head of the Scottish Masons, took the field at the head of the revolutionary forces. But General Guerrero, titular head of the York Masons, led the government troops and overthrew Bravo and his associates in less than a month and with scarcely an effort. Movements similar to this and in sympathy with it were expected to follow shortly in many places. In Vera Cruz the standard of revolt was raised and the governor headed the movement. Active measures prevented such elsewhere. Other States hastened to express their indignation and Vera Cruz retracted its position.

The diplomatic corps in the city had openly advocated the cause of the insurgents; but Poinsett was sure that they had acted without instructions. They had been deceived into thinking the movement would easily succeed because the social aristocracy belonged to Bravo's party. Poinsett added: "It is needless to say that I have pursued a different course. The cause of free institutions is the cause of America, and although I have taken no part in the contest and obtruded no advice, I have not withheld my opinion and counsel whenever it has been asked by this government or by those connected with it." Speaking of the demand that he be sent out of the country he declared: "These people [the Scottish party] persist in regarding me as the principal obstacle to their success and as directing not only the operations of the opposite party but of the government." In closing this long report of the revolt and its collapse, he said he considered the event fortunate since it had overthrown the faction concerning whose plots there had been great uneasi-

ness.⁵³ After telling, on February 9, of the collapse of the revolt, Poinsett showed that he was thinking of making his escape from the continual insinuations and attacks made by the party opposed to the government. He said, "Although very desirous to avail myself of the permission of the President to terminate my mission, I shall wait until the treaties are ratified, and until I can leave this country without prejudice to the interests which have been entrusted to me."⁵⁴

The failure of the Montaño revolt left the Yorkinos in control of the government. The fact that it had ostensibly been directed at Poinsett and had failed to drive him out of the country confirmed the popular notion of his magic influence over the government and country.⁵⁵ In July, two months before they occurred, Poinsett wrote that excitement over the coming presidential elections was high, and there was talk of revising the election laws. He believed the popular party would prevail; but feared a revolution over this and the disordered finances. After the election and before the result was known, he wrote that the candidate of the aristocratic party seemed to lead, and added that if Guerrero, the popular candidate, should not be elected he believed the people would rise against the choice which should be made. On September 25, 1828, he wrote that the election had resulted in the choice, by a very narrow majority, of Pedraza, the aristocratic candidate, over Guerrero, the popular nominee. In anticipation of this the radical Yorkinos had already appealed to arms in the State of Vera Cruz under the leadership of Santa Ana, who had raised a cry for the preservation of the federal system of government, for the sovereign rights of the people, for the

⁵³ Poinsett to Clay, Jan. 9, 1828, MS. Dept. of State, Mex., Desp., III. The most radical Yorkinos wished to execute the rebels. The Escoceses wished to proclaim an amnesty for all. Wisely a middle course was pursued and they were allowed to go into exile, and ultimately to return. See Bancroft, *History of Mexico*, V, 37-40; Rivera, *Historia de Jalapa*, II, 450; Alaman, *Historia de Mejico*, V, 836-839.

⁵⁴ Poinsett to Clay, Feb. 9, 1828, MS. Dept. of State, Mex., Desp., III.

⁵⁵ Looking back, after Poinsett's departure, on the period of party strife during his mission, the *Voz de la Patria*, II, núm. 14, 11 de Marzo de 1830, says: "Poinsett mandaba á Victoria, como á un pilhuanjo, y éste no queria oír mas voz que la de Poinsett, * * * Poinsett llevaba adelante su influjo, y sacaba de el todo el partido posible. Figurábase ser algun dia el arbitro de la Nacion."

Ibar's *Muerte Política de la Republica*, núm. 11, 20 de Mayo de 1829, speaks of "las miras ambiciosas de ese ministro extraniero, agente pagado por el gabinete de Norte-América para remacharnos las cadenas de la esclavitud."

immortal Guerrero, and for the expulsion of the European Spaniards. During the first four days of December there was fighting in the streets of Mexico City, Poinsett wrote the tenth of that month, which resulted in the complete success of the revolutionists. Pedraza, the president elect and, according to Poinsett, the cause of all the trouble, had fled, and Guerrero, the defeated candidate, was made Secretary of War instead of him in the cabinet of President Victoria. Notice had been sent to both factions struggling throughout the country to cease hostilities. The principal agent in effecting the revolution, Poinsett said, was Zavala, who had been forced into the ranks by unwise attacks on him in the Senate, charging him unjustly with having been in communication with the insurrection. The Secretary of State had come to Poinsett and revealed his fears that England or some other foreign power would interfere. Poinsett calmed his fears by declaring that no power had any right to interfere. During December the country was in a state of anarchy. But toward the end of the month most of the States had given in their adherence; and early in the new year the last resistance had ceased. Poinsett declared it to be his belief that it had been the federal institutions only that had saved Mexico from a military despotism. He deplored the violence that had resulted but declared that, if ever a revolution could be justified, this was, for the oligarchy had again gotten control and the weak Victoria had yielded to them a second time. Many of the popular party had been imprisoned without cause. The election was by States, each having one vote cast by its legislature. When the votes were counted by the National Congress it was declared that Pedraza had received a majority of the votes, but that public opinion had pronounced so positively against him that even he had felt the necessity of resigning all claims to the office. In consequence of this the choice was reduced to the next highest. Therefore Guerrero was declared elected. During the remainder of the unexpired presidential term civil commotions continued in some of the States in resistance to the government and the declared result of the election; and the National Senate, still dominated by the aristocratic party, was also resisting the will of the people, especially in the matter of the expulsion of Spaniards and in declaring amnesty for the participants in the late revolution. But early in March Poinsett reported that quiet

had been restored throughout the country and the choice of Guerrero seemed to be giving general satisfaction. And on April 3, 1829, he reported that Guerrero had been inaugurated as President the first of the month and the republic was tranquil. On April 15, he said that the President seemed about to confine his cabinet to members of the popular party, which Poinsett considered a wise move. His friend, Zavala, had been made Secretary of the Treasury, and would, he thought, give general satisfaction.⁵⁶

In his long recapitulation on March 10, 1829 (for the benefit of the new Jackson administration at Washington) of all that had passed since he had been in Mexico, after telling how the members of the defeated Scottish party, and the representatives of the foreign powers had all abused him both publicly and privately, and after reviewing the attacks upon him by the legislatures of Vera Cruz and Puebla, and recounting the suspicions and charges against him in connection with the Montaño revolt and the revolution following the elections of 1828, Poinsett declared his belief that "there is no instance on record of a foreign minister having been so persecuted in any country." He realized that it was hard to believe this hatred was not due to improper interference. But it had resulted purely from his efforts to prevent the encroachments of European powers. If he had chosen to witness such with indifference, he said he could have passed on smoothly and insignificantly. But he did not think this the proper course; and had cheerfully borne the obloquy which his conduct had brought upon him, caring only that his actions should be fully understood in the United States and especially by the government.⁵⁷ It should be noticed here again that

⁵⁶ This account of the campaign, the election, and the results, is taken entirely from Poinsett's letters to Clay running throughout the nine months, as follows: July 16, 1828; Sept. 17, 1828; Sept. 25, 1828; Oct. 22, 1828; Dec. 10, 1828; Dec. 17, 1828; Dec. 24, 1828; Dec. 27, 1828; Jan. 8, 1829; Jan. 10, 1829; Jan. 23, 1829; Jan. 31, 1829; March 3, 1829; April 3, 1829; and April 15, 1829. MSS. Dept. of State, Mex., Desp., IV.

⁵⁷ Poinsett to Clay, March 10, 1829, MS. Dept. of State, Mex., Desp., IV. In this long letter covering 42 pages, commenting further on the persons and principles involved in the recent revolutionary events, he said that Pedraza was a political turncoat; he had fought during the war for independence in the Spanish service against the insurgents; he went as a deputy to the Cortes; on his return he became a minister of Iturbide; afterward he was a leader in the overthrow of Iturbide and an

Poinsett does not claim not to have interfered in Mexican political affairs, but endeavors to defend his actions from the charge of improper interference, by explaining his motive.

POINSETT RECALLED AT MEXICO'S REQUEST

The opposition to the election of Guerrero acquiesced in his inauguration in April of 1829 and it seemed for a time that his administration would succeed in maintaining quiet in the country. But the opposition to Poinsett, who was popularly supposed to have been largely instrumental in bringing about the victory of the new government, never ceased. Attacks by the public press became more frequent, more virulent, and more unreasonable. A periodical of June 6, 1829, asked in inflammatory language why all Mexicans did not unite in one terrific cry that would penetrate the sordid deafness of those controlling the government de-

adherent of the Scottish party; on the discovery of the plot of Friar Arenas and the connection of the Scottish party with it, he deserted that party and won popularity in the punishment of those conspirators and in assisting to overthrow General Bravo; he became Secretary of War; when it was desired to divide the York party he was chosen as the instrument, having friends in all of the opposing factions. His success in the election was due to the fact that some of the State legislatures had been chosen while the Scottish party was in the lead. The senate and supreme court of the federal government were also still of that faction. He believed if the reactionary factions had used their advantages with moderation they could have retained power; but their persecution drove Santa Ana, Zavala, and others to take refuge in revolution.

Poinsett defended the army that took the City of Mexico by assault, and said the cruelties that had been attributed to it were greatly exaggerated. He blamed the government for not having prevented the attack on the city by a vigorous defence at first, and in the absence of that by accepting the proffered opportunity to capitulate before the attack.

The opposition of the recent revolutionists to the Spaniards, he said, could be explained by reviewing the political interference of the Spaniards, who had been uniformly trying to restore Spanish control. The Senate still refused to pass a law expelling the Spaniards as the revolutionists demanded, because the Spaniards had uniformly supported the Scottish party, which still prevailed in that body. He feared this might cause some further disturbance.

For reviews of the election of 1828 and the revolution following, see Bancroft, *History of Mexico*, V, 40-45; Zavala, *Ensayo Historico*, II, 101-148; Alaman, *Historia de Mejico*, V, 839-843; Zamacois, *Historia de Mejico*, XI, 671-715. Zavala's account is of course prejudiced in favor of the revolution, in which he was one of the chief leaders.

manding that the country should rid itself of that bold and intriguing minister, the sole source of all of the country's evils and miseries. On June 24 the same periodical declared that if the Republic of North America really wished to show that she desired the friendship and good faith of Mexico she ought to order this astute and intriguing minister to withdraw from Mexican soil. Let those States know that the Mexican nation detested him and justly desired his expulsion.⁵⁸ On July 15, Poinsett wrote that Mexico was in a critical condition. The dissolution of the confederacy seemed inevitable unless some popular military chief seized control to save it; and that would be a death blow to free institutions. Added to the danger of invasion from Spain was the opposition in the States to the federal government and the dissensions between States. Many Mexicans were so desirous of changing the form of the government that they would rather deliver the country to a foreign prince than see it continue in its present form. He believed European governments were intriguing to bring about such; and said he would like to know the attitude of the administration. For himself, he thought it could not accord with the interests of the United States to permit any European power to obtain undue influence in these states.⁵⁹

At the end of July, 1829, the legislature of the State of Mexico addressed a memorial to President Guerrero requesting the dismissal of Poinsett. It was a long diatribe based confessedly not on facts proved but on a general belief that he was secretly opposed to the interests of Mexico, that he was the cause of discord in Mexico, and that his presence was undesirable. It called to witness the cry of alarm which was resounding throughout the republic against him. It declared that his character as a diplomat ought to have caused him to refrain from all interference in internal affairs. The legislature would not say, as some thought, that he was the controlling spirit of the administration; but it was well known that he had been instrumental in organizing one of the secret societies whose struggle was the cause of the country's dis-

⁵⁸ Ibar, *Muerte Política de la República Mexicana*, núm. 15, 6 de Junio de 1829; *ibid.*, núm. 19, 24 de Junio de 1829; *ibid.*, núm. 1, 11 de Marzo, núm. 6, 23 de Abril, and núm. 26, 18 de Julio de 1829. The last declares that it is also said with some reserve that Poinsett was a paid agent of the Madrid government to assist in the Spanish reconquest.

⁵⁹ Poinsett to Van Buren, July 15, 1829, MS. Dept. of State, Mex., Desp., IV.

asters. It had been suggested that the interests of the United States being opposed to those of Mexico, made it desirable to prolong the discord in the latter and the agent of those States was maintained in Mexico for that purpose. Whether this suspicion was true or not the character of their envoy was such as to adapt him for carrying out such a policy. His natural talents, his smooth and elegant manner, his erudition, his cheerful disposition, and his professed devotion to republicanism all adapted him for political manipulations. If this was not the policy of that government, why did not the President or cabinet at Washington voluntarily recall him, knowing the discord he was causing, to prevent new catastrophes and avoid compromising the friendly relations of the countries? In closing, the legislature requested the President of the Republic to give orders that Poinsett be given his passports to leave the country.⁶⁰ In the following weeks the legislatures of several other States made the same request. A few days after the first attack Poinsett published a lengthy reply to the suspicions and charges, declaring that they were without foundation. In this he said he felt compassion rather than anger, and closed with a paternal exhortation breathing good will for the Mexican people as a whole in spite of the attacks a faction were making upon him. He declared there was no jealousy in the United States for Mexico, but a desire for the latter's prosperity; and appealed to Mexicans to imitate the institutions and the characteristics which made the United States great.⁶¹

In Poinsett's letter to Van Buren of August 7, telling of the manifesto and his reply, he said he would be sensibly mortified in reporting the attacks that had been made on him if he could attribute them to any misconduct or want of prudence on his part. He declared that the suspicions and conjectures were utterly unfounded; and said he had not interfered in the internal affairs of the country nor deviated from the frank, open, manly policy which distinguishes the intercourse of

⁶⁰ "Manifesto of the Legislature of the State of Mexico," Tlalpam, 31 de Julio de 1829, MS. Rel. Ext. A translation of this is enclosed with Poinsett to Van Buren, Aug. 7, 1829, MS. Dept. of State, Mex., Desp., IV. A pamphlet containing the same printed in Spanish also accompanies.

⁶¹ Poinsett's reply, Aug. 2, 1829, MS. Dept. of State, Mex., Desp., IV, enclosed with Poinsett to Van Buren, Aug. 7, 1829. The English translation covers 26 pages. The same printed in Spanish accompanies.

the United States. He was not conscious, he said, of any offense, unless his uncompromising republican principles and friendly intercourse with leaders of the popular party could be considered such. He said the aristocratic, monarchical, and European factions which were in control when he arrived in the country attributed their fall to him; but it was really due to the institutions of the country. They still believed him the soul of the existing government and wished to overthrow him. He said this faction were telling the people of Mexico that the United States was jealous of Mexico and had instructed him to throw obstacles in the way of progress. They even went so far as to say that the cabinet in Washington had caused the death of their minister Obregon (who had committed suicide) and therefore they argued publicly that the people of Mexico would be justified in assassinating Poinsett. He said he had had frequent interviews with President Guerrero, who had expressed his regret at the attack and his own satisfaction with Poinsett's conduct, and had spoken in strong terms of the infamy of those who thus sought to interrupt the friendly relations of the two republics. The President said he regarded it really as an attack on those in control of the government.⁶² Although Poinsett asserts that he had not interfered in the internal affairs of the country, and asserts that he was not conscious of any offense, yet in this very defense of his conduct he admits his friendly intercourse with members of the popular party, and by implication his unfriendliness for the members of the opposing factions. This was exactly their complaint against him.

Poinsett's frequent and lengthy defenses of his conduct in his correspondence with the government at Washington were apparently occasioned by a feeling that his conduct was not fully approved there. Communications from Clay had been very infrequent for some time before

⁶² Poinsett to Van Buren, Aug. 7, 1829, MS. Dept. of State, Mex., Desp., IV.

Zavala, who was in the ministry of Guerrero at the time of the legislative attacks, but who resigned soon after, says that behind all these could be seen the hand of two other ministers, Herrera and Bocanegra. The timid and uncertain policy of Guerrero, who was aware of their plans, he says, enabled them to do this. Zavala, *Ensayo Historico*, II, 197. Ibar, *Muerte Politica*, núm. 32, 8 de Agosto de 1829, said: "¿Quién fue el que mandó asesinar á nuestro enviado á los Estados Unidos del Norte, al virtuoso Obregon? Poinsett. Conocidas son las intrigas de este ministro infame, y hoy se han presentado á todo luz."

the close of the Adams administration; and it was several months before Van Buren, the new Secretary of State wrote to him, except on matters of mere routine. This neglect was the occasion of some complaint by Poinsett. Finally, on October 16, 1829, the Jackson government passed its opinion on his conduct. Van Buren said he regretted to learn that there was a prejudice against Poinsett of the strongest and, there was every reason to fear, of the most incurable type; and continued: "The only ground upon which this state of feeling appears to be justified, is the allegation on the part of those who entertain it, that you have availed yourself of your situation to intermeddle in the domestic affairs of that Republic. The suspicions entertained on this subject—the existence of which he sincerely deprecates—the President feels himself justified, by all the information of which he is possessed, in considering without just cause. The fact that no complaint has at any time been made by the authority to which you are accredited, which would be the most likely to be informed of such interference, if it did exist, and the first to feel aggrieved thereby; your knowledge of the established policy of this government in that respect, and its decided repugnance to all intermeddling in the internal concerns of other states; your own assurance to the contrary; and the confidence which the President reposes in your discretion and patriotism—secure him from the apprehension that the present embarrassed state of our affairs with that country is attributable to the indiscretion of the representative of the United States." But, he said, whatever the cause of those suspicions might be, they existed and were believed by the President to interfere in the relations of the two countries. Since Poinsett, availing himself of the permission granted by the preceding administration, had already expressed a wish to return, the President, Van Buren said, "gives his assent to your resignation. It is, however, his anxious wish that your return should not be attended by any circumstances which might wear the appearance of censure, or afford countenance to the imputations of your enemies." The way to prevent this "assent to your resignation" from having the appearance of censure was outlined in the following paragraph. If by the time he should receive this letter there should have been such an effectual change in sentiment toward him in Mexico as to render his continuance agreeable and to lead him to think he could

carry into effect the views of his government, it would accord with the President's wishes that he should remain where he was. He was to be at liberty to speak freely in his interviews with public men of his freedom of election to return or remain.⁶³

Jackson and Van Buren apparently had no expectation that there would be such a change in sentiment toward Poinsett that he would think of remaining. The belief that the prejudices were of an incurable character had been expressed in the beginning; and the whole tone of the letter, especially the instructions concerning taking leave, seem to assume that he would return. A chargé was appointed and sent to take his place. The apparently optional character of the recall seems to have been simply a device to "save the face" of Poinsett. Unless there should be an "effectual change in sentiment" there was really no option.

But if the apparent option in Poinsett's recall had been a real option on October 16, a chain of circumstances which had been in operation for more than three months culminated the next day to make his recall positive. On October 17 Montoya, the Mexican chargé in Washington, handed to Van Buren a letter from the President of Mexico to the President of the United States demanding the recall of Poinsett. This had been written on July 1, 1829, a full month before the manifesto of the legislature of the State of Mexico had been presented to Guerrero requesting him to order that passports be given to Poinsett. President Guerrero said to President Jackson:

Of late, public opinion has pronounced itself against him in the most conclusive, general and decided manner, as appears from the writings published almost every day in nearly all the states of the confederation. The public clamor against Mr. Poinsett has become general, not only among the authorities, and men of education, but also among the vulgar classes; not only among the individuals who suspected him, but also among many of those who have been his friends. To Mr. Poinsett are attributed the misfortunes which have befallen the Republic, and it has even been unhesitatingly supposed that he had a direct influence over the proceedings of the Government, in consequence of which they have not been received by the public with the respect which is due to them. Owing to the general distrust of Mr. Poinsett the relations be-

⁶³ Van Buren to Poinsett, Oct. 16, 1829, MS. Dept. of State, Instructions, American States, XIV, 141.

tween the two republics have not been attended with that success which had been anticipated.

The fact that Poinsett's recall had not previously been demanded in spite of the fact that his presence had caused these embarrassments is suggested as evidence that the Mexican Government was unwilling to do anything to disturb friendly relations.

But things have now arrived at such a point that the Government of Mexico would fail in its performance of its most essential duties if it forbore from asking of that of the United States the recall of its minister. * * * The course of events may be such as to require of the Government of Mexico, as a duty, the exercise of its rights to grant the necessary passports to Mr. Poinsett before the receipt at Mexico of the answer of the Government of the United States of America. In such case (which God forbid) the Government of Mexico trusts that that of the United States of America, which is characterized by the impartiality and liberality of its principles and institutions, will appreciate the propriety of a step of this nature, which it would itself adopt if placed in the same situation and under similar circumstances.⁶⁴

In the note to Montoya enclosing this demand for Poinsett's recall, the Mexican Government told its chargé that it wished to do nothing to disturb peaceable relations with the United States; but instructed him to ask an audience, express a sincere desire to preserve harmony, explain the situation in Mexico with respect to the United States minister, and say that the Mexican Government finds itself unhappily but necessarily compelled to ask that minister's recall.⁶⁵

On October 17, Van Buren added a postscript to his letter of the preceding day to Poinsett revoking the option of remaining or returning, thus making it a positive recall. He added: "In the absence of a contrary allegation on the part of the Mexican Government, and confiding in your assurances, he [President Jackson] still allows himself to believe that the prejudices against you are without just cause."⁶⁶ Al-

⁶⁴ Guerrero to Jackson, [July 1, 1829], MS. Dept. of State, Notes from Mexican Legation, I, enclosed with Montoya to Van Buren, Oct. 17, 1829. The Spanish original of Guerrero's letter accompanies this translation.

⁶⁵ Secretario to Montoya, 1 de Julio de 1829, MS. Rel. Ext.

⁶⁶ P. S. Oct. 17, to Van Buren to Poinsett, Oct. 16, 1829, MS. Dept. of State, Instr., Am. Sts., XIV, 141; Jackson to Guerrero, Oct. 17, 1829, MS. Rel. Ext.

A postscript of Oct. 17, attached to Van Buren to Butler, Oct. 16, indicates that Jackson and Van Buren thought the attacks on Poinsett due to the failure of the

though the Jackson administration thus officially exonerated Poinsett again, yet the wording is such as to indicate that the approval was not very enthusiastic and was given only because there was no positive assertion by the Mexican Government that the prejudice against him was with just cause. There is a slight indication that the administration was not fully convinced of Poinsett's innocence, or was somewhat provoked at his conduct, in the fact that on this same day, October 17, a draft which Poinsett had drawn on the Department was protested because of what was regarded as a small irregularity in the way Poinsett had retained for himself the sum of money due to the difference in the rate of exchange between the two countries.⁶⁷ The matter could have been arranged in a manner less humiliating to Poinsett had it been so desired. This seems to have been "the last straw which broke the camel's back." In Montoya's letter to his government telling of his presenting the demand for the recall, he too assumed the innocence of Poinsett because of the absence of allegations of his guilt. He said he was persuaded there were no grounds for the charges made in Mexico that the United States was jealous of the prosperity of Mexico.⁶⁸

In the instructions which were written on October 16 for Butler, who was to take Poinsett's place if the latter should return, there is a

Mexican Government to protect him adequately rather than to his actions. *House Docs., 25th Cong. 2d sess., No. 351*, p. 52.

Jackson's reasons for recalling Poinsett, quoted from the Jackson MSS., are printed in Reeves, *Diplomacy under Tyler and Polk*, 68.

⁶⁷ Van Buren to Poinsett, Oct. 17, 1829, MS. Dept. of State, Instr., Am. Sta., XIV, 148. When Poinsett was embarrassed by learning that his draft had been protested, he said he regretted that this had been thought necessary, since he would have made good the difference with pleasure if he had known the Department wished. He explained how he had been drawing for his salary and why he had done so, and closed by saying he will "be perfectly content with the decision of the Department with respect to the draft for £100 on London provided the government will refund the amounts for which I have given them credit, on account of the favorable state of exchange between Mexico and the United States." Poinsett to Van Buren, Dec. 9, 1829, MS. Dept. of State, Mex., Desp., IV.

⁶⁸ Montoya to Secretario, 19 de Octubre de 1829, MS. Rel. Ext.

For brief discussions of Poinsett's recall, see McMaster, *History of the People of the United States*, V, 549; Bancroft, *History of Mexico*, V, 81; Bocanegra, *Memorias*, I, 382 and II, 23; Zamacois, *Historia de Mexico*, XI, 810; Zavala, *Ensayo Historico*, II, 197; Mayo, *Political Sketches*, 95.

positive statement of the government's desire that such actions as Poinsett's should not be repeated. Van Buren said:

With respect to your future official correspondence with the Government of Mexico, and your intercourse, public and private, with the people and their functionaries, the past strongly admonishes you to avoid giving any pretext for a repetition against yourself of the imputations which have been cast upon Mr. Poinsett, of having interfered in the domestic concerns or politics of the country; or even showing any partiality towards either of the parties which now appear to divide the Mexican people. The manifestation of such a preference, or of any connexion, remote as it might be, with their political associations, might again be construed into a wish to influence or foment their party divisions. The President, therefore, expects you to exercise the most sedulous care in guarding against similar imputations, and wishes you to use your utmost endeavors in allaying the irritation which seems to pervade a large portion of the people, and to do away [with] the groundless and unjust prejudices which have been excited against the government of the United States. A social, open, and frank deportment towards men of all classes and all parties; a proper degree of respect for their opinions, whatever they may be; a ready frankness in explaining the true policy of your government, without attempting to obtrude your views where they are not desired; and the most guarded care in condemning or censuring theirs, are among the means which the President would suggest as most likely to command the confidence of the people, and to secure for yourself a proper standing in the opinion of their public functionaries.⁶⁹

It was on December 9, 1829, that Poinsett's recall reached him.⁷⁰ The Mexican Government had not found it necessary to give him his passports as Guerrero's letter demanding his recall said might have to be done. But Poinsett had himself asked permission, in a letter of November 4 to return home.⁷¹ On December 25 he had a conference with the provisional executive and took formal leave.⁷² On the last

⁶⁹ Van Buren to Butler, Oct. 16, 1829, *House Docs., 25th Cong. 2d sess.*, No. 53, p. 51. It should be mentioned that Butler's conduct in Mexico was worse than Poinsett's, his motives less pure, and that his recall was also demanded.

⁷⁰ Poinsett to Van Buren, Dec. 9, 1829, acknowledging receipt of his recall, MS. Dept. of State, Mex., Desp., IV.

⁷¹ Poinsett to Van Buren, Nov. 4, 1829, MS. Dept. of State, Mex., Desp., IV. This says he had asked the commander of the United States squadron in the West Indies to send a warship to the Mexican coast to take him from the country.

⁷² Poinsett to Van Buren, Dec. 26, 1829, saying he had taken leave the preceding day and expected to depart January 2, 1830, MS. Dept. of State, Mex., Desp., IV.

day of the year the Provisional President of Mexico, in a letter to the President of the United States, acknowledged the latter's note of October 17 announcing Poinsett's recall, and said that act was looked upon as a testimony to the sincere friendship of the United States for Mexico.⁷³

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A new revolution had overthrown Guerrero, who had taken flight, and Vice President Bustamante took control. Poinsett to Viesca, 15 de Diciembre de 1829, asked an audience to present his letter of recall. Secretario de Relaciones to Poinsett, 24 de Diciembre, in reply appointed December 25. Poinsett left Mexico January 3, 1830, and arrived at New Orleans February 2. Poinsett to Van Buren, New Orleans, Feb. 3, 1830, MS. Dept. of State, Mex., Desp., IV.

⁷³ Provisional President to President of the United States, 31 de Diciembre de 1829, MS. Rel. Ext. Accompanying this is Secretario to Poinsett, 31 de Diciembre, granting the privilege to leave and assigning an escort.

About the middle of December a circular letter was sent by the central government to the governors of the States telling of Poinsett's recall. This and congratulatory replies to it from fifteen State governments are in an expediente in MSS. Rel. Ext.

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EDITORIAL COMMENT

THE BRYAN PEACE TREATIES

There recently has appeared in the public press the authentic text of the first of the series of treaties, the negotiations for which were initiated by Mr. Bryan soon after his assumption of the duties of the office of Secretary of State, having for their object the investigation of all questions of every nature whatever which diplomacy may fail to settle.

The proposed treaties have come to be popularly regarded as substitutes for the unratified arbitration treaties negotiated during Mr. Taft's administration. This mistaken idea, and the recollection of the tortuous passage of the Taft treaties through the Senate, have aroused a great deal of interest and no little curiosity among those persons who are interested in peace and arbitration as to the exact phraseology which Mr.

Bryan finally decided upon, and hopes to get the Senate to advise and consent to, in order to carry out his peace ideas.

While Mr. Bryan has taken the public into his confidence by announcing last April the substance of the draft of the proposed treaty as submitted to the diplomatic representatives at Washington, the probability that the first actual treaty signed will be used more or less as a model for all the other treaties, and the further fact that it is understood that the Senate Committee on Foreign Relations, to whom the draft was submitted, approves it, make the actual text of this treaty of more than passing interest.

The first of these treaties was signed by Secretary Bryan and the Minister of Salvador on August 7, 1913. The treaty is very short, having only a preamble and five articles. The first three articles deal with an international commission of inquiry, the fourth with the subject of armaments, and the fifth contains the formal stipulations as to ratification and duration. The treaty is in no sense of the word an arbitration treaty, the word arbitration not being mentioned, and is intended, as has been publicly announced by Mr. Bryan, to supplement existing arbitration treaties and similar treaties which may be made hereafter. As if to emphasize this point, it may be mentioned incidentally, the first treaty of the series was negotiated with a country with which the United States has an arbitration treaty of indefinite duration, its stipulation on this point providing that the treaty shall remain in force until one year after notice of termination shall be given by either party.

In adopting the expedient of leaving in force the present arbitration treaties, with their exceptions of honor and vital interests, and negotiating supplemental treaties to provide for an investigation and report upon all questions in dispute, without exception, the Secretary of State has devised a plan which does not appear to be open to serious objection in the Senate on constitutional grounds and which seems equally unobjectionable to the governments which refuse to conclude general treaties of obligatory arbitration. Up to the present time the State Department has announced the acceptance of the plan by twenty-nine governments.

The text of the new treaty is as follows:

The Republic of Salvador and the United States of America, being desirous to strengthen the bonds of amity that bind them together and also to advance the cause of general peace, have resolved to enter into a treaty for that purpose, and to that end have appointed as their plenipotentiaries:

The President of Salvador, Señor Don Federico Mejia, Envoy Extraordinary and Minister Plenipotentiary of Salvador to the United States; and

The President of the United States, the Honorable William Jennings Bryan, Secretary of State, who, after having communicated to each other their respective full powers, found to be in proper form, have agreed upon the following articles:

Article I. The high contracting parties agree that all disputes between them, of every nature whatsoever, which diplomacy shall fail to adjust, shall be submitted for investigation and report to an International Commission, to be constituted in the manner prescribed in next succeeding article; and they agree not to declare war or begin hostilities during such investigation and report.

Article II. The International Commission shall be composed of five members, to be appointed as follows:

One member shall be chosen from each country by the government thereof, one member shall be chosen by each government from some third country, the fifth member shall be chosen by common agreement between the two governments. The expenses of the commission shall be paid by the two governments in equal proportion.

The International Commission shall be appointed within four months after the exchange of the ratifications of this treaty, and vacancies shall be filled according to the manner of the original appointment.

Article III. In case the high contracting parties shall have failed to adjust a dispute by diplomatic methods, they shall at once refer it to the International Commission for investigation and report. The International Commission may, however, act upon its own initiative, and in such cases it shall notify both governments and request their co-operation in their investigation.

The report of the International Commission shall be completed within one year after the date on which it shall declare its investigation to have begun, unless the high contracting parties shall extend the time by mutual agreement. The report shall be prepared in triplicate; one copy shall be presented to each government and the third retained by the commission for its files.

The high contracting parties reserve the right to act independently on the subject matter of the dispute after the report of the commission shall have been submitted.

Article IV. Pending the investigation and report of the International Commission, the high contracting parties agree not to increase their military or naval programmes, unless danger from a third Power should compel such increase, in which case the party feeling itself menaced shall confidentially communicate the fact in writing to the other contracting party, whereupon the latter shall also be released from its obligation to maintain its military and naval *status quo*.

Article V. The present treaty shall be ratified by the President of the Republic of Salvador, with the approval of the Congress thereof; and by the President of the United States of America, by and with the advice and consent of the Senate thereof, and the ratifications shall be exchanged as soon as possible. It shall take effect immediately after the exchange of ratifications, and shall continue in force for a period of five years; and it shall thereafter remain in force until twelve months after one of the high contracting parties have given notice to the other of an intention to terminate it.

A comparison of the main provisions of this treaty with the provisions

relating to commissions of inquiry of the Convention for the Pacific Settlement of International Disputes, adopted at the Hague Conference of 1907 (Part 3, Articles 9-36), and the provisions of the unratified Knox-Bryce treaty of August 3, 1911, would seem appropriate at this time.

It should first be noted that the reference of disputes to the commissions provided for by the Hague Convention is merely optional with the signatory Powers, while in both American treaties reference to the commission provided for in the respective treaties is obligatory.

It should next be observed that the commission provided for in the Bryan treaty is a permanent commission, while the commissions of the Hague Convention and of the Knox-Bryce treaty are temporary commissions, instituted in each case as occasion arises.

As to the jurisdiction of the respective commissions, the following is a summary of the treaty provisions on this point. The Hague Convention provides for an inquiry into international disputes on points of fact only, with the further reservation that these points do not involve honor or vital interests. The jurisdiction of the commission under the Knox-Bryce treaty is divided into three categories: first, inquiries into disputes which come within the scope of the arbitration clause, namely, international differences arising by virtue of a claim of right under treaty or otherwise, which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity,—the inquiry into these subjects to be had upon the request of either party before submitting them to arbitration; second, all other controversies not falling within the obligation to arbitrate mentioned in the preceding category; third, in case a dispute arose as to whether a difference fell within the class of cases to be submitted to arbitration, the commission was to have jurisdiction finally to decide that question. It was this last jurisdictional clause upon which the treaty was principally attacked in the Senate. The jurisdictional clause of the Bryan treaty is shorter and simpler than the same clause in either of the preceding treaties, for it merely says that all disputes of every nature whatsoever which diplomacy has failed to adjust shall be referred to the commission. It will be noted that the commissions provided for in the American treaties are not limited in their investigations to questions of fact, as in the case of the Hague commission, but that the language of the American treaties is broad enough to include also questions of law and of policy.

In the personnel of the respective commissions the three treaties again present a different alignment. Under the Hague and Bryan treaties

the commissions are composed of five members, while under the Knox-Bryce treaty the commission was to be composed of six. Again, the former treaties provide that one member only shall be chosen from each of the countries in dispute, thus making the majority of the commissioners non-nationals or strangers to the controversy, while the latter treaty provided that all members of the commission should be nationals, three being designated by each country.

The three treaties appear to have only one provision in common, namely, that which deals with the effect of the report of the commission. The Hague Convention provides (Article 35):

The report of the commission is limited to a statement of facts, and has in no way the character of an award. It leaves to the parties entire freedom as to the effect to be given to the statement.

The Knox-Bryce treaty reads, with reference to the differences included under the jurisdictional clauses mentioned under one and two above, as follows:

The reports of the commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or on the law and shall in no way have the character of an arbitral award.

The Bryan treaty reads:

The high contracting parties reserve the right to act independently on the subject matter of the dispute after the report of the commission shall have been submitted.

The foregoing are the principal provisions of the Bryan treaty concerning international commissions of inquiry as compared with the provisions of its two predecessors. The Bryan treaty lacks, however, the detailed provisions concerning the organization and procedure of the commission contained in the other two treaties. No mention is made in it as to how are to be determined the exact questions or issues to be investigated by the commission, and the form or phraseology of a question is often of the greatest importance. Such details as the seat of the commission, meetings, language to be used, the appearance before it of agents and counsel of the two governments, the service of notices upon and the examination of witnesses, the obtaining of authentic documentary evidence, the subordinate personnel, the keeping of records, all of which would seem to be necessary for the proper conduct of the business of the commission, may perhaps be regulated by rules adopted by the commissioners themselves, supplemented by legislation in the

two countries involved, but it would appear to be easier to incorporate provisions of this kind in the treaty so that they would then become the law of the land or at least make it obligatory upon the contracting nations to adopt legislation in conformity with the treaty.

The Bryan treaty contains, in addition, three novel provisions. Article III gives the commission power to act upon its own initiative, and in such cases the governments are requested to coöperate in the investigation. Much of the merit of this provision is, however, lost by the absence of a binding obligation on the part of the governments to coöperate with the commission in these cases. A refusal to furnish data or information necessary to the inquiry would effectually stop an investigation begun on the commission's own initiative.

The treaty provides in Article I that during the investigation and report the contracting parties shall not declare war or begin hostilities, and Article IV contains a prohibition of the increase of armaments pending the investigation and report of the commission, unless one of the parties is menaced by a third Power, in which case both parties to the treaty are released from the obligation of the article.

The above comparison of the present Bryan treaties with the unratified treaties negotiated during the last administration suggests also a comparison of the progress to be accomplished in the peaceful settlement of international disputes by the ratification of the present treaties with what would have been accomplished by the ratification of the Taft treaties in unamended form.

The Taft treaties superseded the general arbitration treaties now in effect (or recommended for extension). They therefore, generally speaking, eliminated the exceptions of vital interests and honor, but substituted instead the limitation of "justiciable" questions upon the obligation to arbitrate. All questions not justiciable were to be referred to the commission of inquiry, whose report had no binding effect. A further provision gave the commission the power to decide what were and what were not justiciable questions.

The Bryan treaties are merely supplements to the existing treaties and, therefore, contemplate that the exceptions of honor and vital interests shall be retained. By providing, however, that every question of whatever nature shall be referred to a commission of inquiry, the two treaties reading together provide that all questions shall be arbitrated except questions involving honor and vital interests and that these latter shall be referred to the commission for investigation.

Brushing aside shades of difference and technical distinctions, there does not appear to be much difference, on the one hand, between the classes of cases which are to be referred to arbitration and, on the other hand, between the classes of cases which are to be referred to the commission of inquiry, under the respective treaties. An obvious distinction does not seem to exist between justiciable disputes and disputes not involving honor and vital interests, which are the two classes of cases for which arbitration is provided under the Knox and Bryan plans respectively. The only distinction would probably be confined to theory, namely, that some justiciable questions may involve honor and vital interests, and that there may be questions which, while not involving honor and vital interests, would still not be justiciable. As to the differences to be referred to the commission of inquiry, it appears equally immaterial whether they be denominated by indirection as cases not justiciable or as cases involving honor and vital interests.

Aside, then, from the clause of the Taft treaty which gave the commission jurisdiction to decide which were and which were not justiciable questions, which clause was eliminated in the Senate, and leaving out of consideration the clauses of the Bryan treaty as to the delay of hostilities and the non-increase of armaments, it is believed that substantially the same result will be accomplished and the same progress made in the peaceful settlement of international disputes by the ratification of the Bryan treaties as supplements to existing arbitration treaties, as would have been the case had the Taft treaties been ratified. No account is taken of the amendments of the Senate excluding from the operation of the Taft treaties certain questions which were not considered proper for submission to arbitration. These exceptions were foreign to the merits of the treaty then under consideration and may be applied, if the Senate sees fit, to any arbitration treaty submitted for its approval.

THE CENTRAL AMERICAN UNION

The recent discussion in the newspapers concerning the formation of another Central American union has caused considerable comment among persons interested in the future welfare of those countries as to the opportuneness of bringing about such a federation at this time.

A historical examination discloses that many attempts have been made to form such union but without succeeding in establishing it upon a sound and permanent basis.

Central America was discovered by Columbus in 1502. Under the name of Guatemala it continued as a Spanish dependency until the year 1821, being organized into five departments, bearing the names of the present five Central American countries. In 1821, the captaincy-general of Guatemala declared itself free from Spain, and the five divisions were temporarily incorporated in the Mexican Empire during the year 1822, but they regained their autonomy under the names of the present states of Central America on the declaration of a Mexican Republic, and in 1823 they combined to form the Republic of the United States of Central America. This union was dissolved in 1839 as a result of the conflict between liberalists and federalists, and another union of the republics, except Costa Rica, was made in 1842 and dissolved in 1845.

Again in 1850, Honduras, Salvador and Nicaragua combined to restore federal unity, but their armies were defeated by the President of Guatemala. From 1871 to 1876 another attempt was made, and in 1885 the President of Guatemala lost his life in fighting to promote a union.

In 1895, Nicaragua, Salvador and Honduras formed the Greater Republic of Central America. A constitution was formed providing for the admission of Guatemala and Costa Rica, but as this union became unsatisfactory to Salvador, it was dissolved in December, 1898. On August 27th, of the same year, delegates representing Nicaragua, Honduras and Salvador drew up and signed a constitution in Managua providing for a Central American union, but nothing ever came of it.

It can thus be seen that the repeated attempts for the formation of a union were not productive of any permanent results.

In 1907, occurred the first Central American Peace Conference in Washington. The object of the meeting was "to settle upon the means of preserving the good relations between the said Republics and of obtaining an enduring peace in those countries." At a session of the conference, the delegate of Honduras presented a proposal relative to a Central American union. He was supported by the delegate of Nicaragua, but opposed by the delegations from Costa Rica, Salvador and Guatemala. The delegate from Honduras thought that the union of the countries into a single federal republican state would be a sure and definite means of preserving lasting peace between them, and he felt that such a union would be the certain destiny of the countries. He proposed a practical method of bringing the union into existence, by the respective congresses convoking a constituent body to draw up the fundamental law of the republic and to organize the executive and judicial branches. Two

of his propositions were that the debts of the respective countries should be continued to be charged to those states, and that while the republic was being organized, a supreme court would be established which would be independent and impartial and with jurisdiction to decide controversies between the states.

The delegations of the three opposing states, while agreeing that the idea of a political union was a noble one, believed that the time was not ripe for its formation, because if such union were to be solid and permanent it must be based upon harmonious and equal moral, material, economic and sociological conditions. They further believed that the conference should prepare for such a union by improvement of communications, the unification of laws and customs, and the encouragement of periodical reunions.

One of the delegates argued that the republics could not advance so long as the governing classes maintained themselves in power and the greater part of the revenues was consumed in maintaining a large government personnel and a numerous army.

In 1910, the second Central American Conference met in El Salvador, but the record does not disclose that there was any official discussion of the question of the formation of a union.

It would seem that the realization of a Central American Republic is inevitable. That it will come in the future there can be no doubt. When it does, it will be a federation that is formed on the same principle as that of the United States of North America, or of Mexico, that is, a federal union, and not a confederation of states. It will come about gradually and as a matter of evolution, without the use of arms or due to military force. A union formed on such lines is the only one that can be lasting and enduring.

It can not be expected that those countries of Central America which to-day are prosperous, progressive and peaceful, whose people are industrious, law-abiding and contented, and whose governments are presided over by presidents who are liberty-loving, honorable, honest in their dealings, and who do not override their constitutions in an endeavor to satisfy their personal ambition to perpetuate themselves in political office, would be willing to form a permanent union at this time with such of those countries in which conditions are diametrically the opposite.

On the other hand, the conditions that prevail in some of the Central American Republics can not continue much longer. Soon we shall witness the opening of the Panama Canal. It will mark a new era for prog-

ress in Pan America and will bring in closer relations the people of these two continents. There will result an increase of commerce, but before certain of the countries of Central America can benefit thereby, it will be necessary for them to make certain improvements in their monetary system, in their ports, in their railroads, and in their credit.

The eyes of the world are turned to the Panama Canal. The people of the world will in the future visit the countries of Central America and will there observe the great opportunities of development. Capital and labor which are so much needed by certain of the Central American countries will rapidly enter into them when there is the assurance of continued peace and the guarantee of modern and progressive government. That assurance will come with the opening of the Panama Canal, for the world will not permit revolutionary or mediæval conditions to exist in and near that important artery of commerce. The result will be that all of the countries in Central America will become rich and prosperous and their governments stable and upright, and, when that day arrives, the Central American Republic will, by a process of evolution, logically and naturally become a realization.

In his address before the First Central American Conference, Secretary Root said: "You are one people in fact, your citizenship is interchangeable—your race, your religion, your customs, your laws, your lineage, your consanguinity and ties of social relations, your sympathies, your aspirations, and your hopes for the future are the same."

With the basic characteristics so well enumerated by Mr. Root, and with the advent of the opening of the canal and the consequent benefit which will accrue to the countries of Central America, it would seem to be a foregone conclusion that the realization of a Central American union is inevitable.

MEXICO

Whatever may have been the faults of the Diaz administration, and however laudable the efforts of the men who deposed him to introduce a larger degree of republican constitutional methods in the administration of the Mexican Government, the attempt has turned out most disastrously, not only for those who engaged in it, but for the Mexican people as a whole. When Diaz left the shores of Mexico, an exile from his native country, which he had served so well and long, peace and order and prosperity seemed to depart with him. Ever since then the country has been a continuous scene of revolution and counter-revolution, in which thou-

sands of lives have been sacrificed and inestimable damage done to the property and business interests of the country. Neither have the inevitable accompaniments of such a state of affairs been lacking, for the daily press has been filled with horrible accounts of brigandage, rapine and plunder.

At the date of our last comment on Mexico (April, 1912,) Francisco I. Madero, the man who overthrew Diaz by force of arms, was President of Mexico, to which office he had been elected on the 15th of October, 1911, after an intervening provisional presidency under Francisco de la Barra. The reign of Madero, however, was not destined long to last. Early in 1912, dissatisfaction over the distribution of the spoils of office, in which it was thought the members of Madero's family had too large a share, afforded an excuse for an armed revolt, headed by Pascual Orozco, against Madero's government. Uprisings in different parts of Mexico, each headed by its own separate leader, soon broke out, and the embers of revolution and brigandage burst into flame over a large part of the country. This stage of the internal strife was terminated on February 18, 1913, by the capture and resignation of Madero, accomplished by a coup d'etat of the army, after a revolt of ten days in the capital of the nation, headed by Felix Diaz, nephew of the former President of that name, during which a large part of the center of the city was demolished. Four days later, on the night of February 22d, President Madero and Vice-President Suarez, while being conveyed from the palace to the prison, were both shot and killed, an awful exemplification of the proverb that he who draws the sword shall perish by the sword. The government, which immediately upon the capture of Madero was placed under the provisional presidency of General Victoriano Huerta, claimed, that the shooting occurred during an attack upon the convoy. Madero's friends and supporters, however, allege that he was deliberately assassinated by his captors, acting under orders. A considerable portion of Mexico refused to accept General Huerta's presidency, and armed opposition to the extension of his government to certain of the states has resulted in a prolongation of the fratricidal struggle for political domination.

Although General Huerta was promptly recognized by several of the large Powers, the American ambassador, who congratulated him upon his assumption of office, was recalled, and the United States has since declined recognition.

The refusal of the United States to recognize General Huerta added to

the complexity of the already trying relations between the two countries. General Huerta was no doubt considerably weakened, both at home and abroad, while the security of Americans and their interests in Mexico was not likely to be increased or the dangers to them diminished. Neither faction in Mexico being apparently able to make headway against the other and the chaotic situation seeming to grow worse instead of better, powerful pressure was brought to bear upon President Wilson to intervene, not only by Americans whose property was at stake, but, it is reported, by European countries as well. Calmer and more peaceful councils prevailed, however, and, instead of taking the step which everybody realized would mean a bloody and costly conflict between the United States and Mexico, President Wilson in August last sent a personal representative to the City of Mexico to offer the good offices of the United States to bring about peace between the contending factions. The offer was not unreserved, but was conditioned upon the following:

- (a) An immediate cessation of fighting throughout Mexico, a definite armistice solemnly entered into and scrupulously observed;
- (b) Security given for an early and free election in which all will agree to take part;
- (c) The consent of General Huerta to bind himself not to be a candidate for election as President of the Republic at this election; and
- (d) The agreement of all parties to abide by the results of the election and coöperate in the most loyal way in organizing and supporting the new administration.

Mr. Lind, the President's personal representative, was received by Señor Gamboa, General Huerta's Secretary for Foreign Affairs, and, after several interviews, at the last of which the President's letter of instructions to Mr. Lind was delivered to Señor Gamboa, the latter, on August 16th, declined in writing the offer of the United States on the conditions named, taking issue at the same time with many of the statements of fact made by President Wilson. The President thereupon, on August 27th, personally laid before Congress the facts concerning the relations between the two countries, the instructions to Mr. Lind, and Señor Gamboa's reply. The President's address, containing the instructions, and the reply of Señor Gamboa, are printed in the supplement to this Journal, pages 279 and 284.

As to the policy of the United States in the circumstances, President Wilson stated that the situation must be given time to work itself out. In the mean time, he proposed to apply the neutrality laws of the United States in such way as to forbid the exportation of arms or munitions of war from the United States to any part of the Republic of Mexico, so

that neither side to the struggle in Mexico should receive any assistance from the American side of the border. The State Department then warned all Americans to leave Mexico and the American diplomatic and consular representatives were instructed to notify all officials, civil and military, in Mexico, that they would be held strictly responsible for any harm or injury done to Americans or their property. Many Americans heeded the President's warning and returned to the United States.

This state of affairs remained unchanged for about a month, when reports from Mexico City indicated that preparations were being made to hold a general election on October 26, 1913, at which provisional President Huerta would, it was stated, not be a candidate. The receipt of this information seemed to clarify considerably the surcharged atmosphere between Washington and Mexico City, for it appeared to indicate that President Wilson's principal objection to recognition—the continuation in power of General Huerta—would be removed.

This encouraging turn of events was, however, merely a slight rift in the gathering clouds. The revolutionists declared that they would not participate in an election held under existing conditions, and opposition shortly developed in the Mexican Congress to holding the election on the ground that the country was not sufficiently pacified to make proper preparations for an election or to open the polls at a sufficient number of places. The friction at Mexico City between Congress and the provisional President rapidly increased, and culminated in the middle of October in the dissolution of Congress, the arrest of many of the deputies, and the assumption by General Huerta of the legislative power.

These acts of General Huerta were immediately denounced by President Wilson as lawless and as constituting bad faith towards the United States. They were not only a violation of the constitutional guarantee, he said, but they destroyed all possibility of fair and free elections. He stated that he would not, therefore, feel justified in accepting the result of such an election or in recognizing the president so chosen.

Thus the situation stands at the date of the present writing—October 15th. The shifting of events in this unfortunate international drama are so kaleidoscopic as to make the next scene as uncertain as the final act is to foresee. Intelligent comment from the point of view of international law is, therefore, not practicable at this time. The attitude of the President of the United States towards Mexico since the death of Madero has naturally been the subject of no little discussion and some difference of opinion. While there is hardly intelligent dissent from

President Wilson's policy from an idealistic point of view, there are some who believe that he has set up an impracticable standard for Mexico, and others, relying upon the doctrine that internal changes in a state do not affect its international position, assert that the President's course is not well founded in international law and that he has confused the recognition of new states with the recognition of new governments.

Without attempting to support or refute either of these arguments or to justify or criticise the President's policy, an examination of the historical attitude of the United States towards Latin-American countries under similar circumstances seems to show that he is not attempting to inject into the present case new or impracticable principles of his own. Precedents may be found for his refusal to recognize General Huerta, for the sending of a confidential agent into the country and for his warning to Americans to leave the country. They appear to show that the principles which President Wilson is now invoking and the policy he has seen fit to pursue have been applied and followed in the past in the relations of the United States with Latin America. (See Moore's *Digest of International Law*, Vol. I, pp. 138-168.)

COUNT TADASU HAYASHI

Count Tadasu Hayashi, one of the most distinguished of contemporary Japanese diplomatists, died in Tokyo, July 10th last, in his sixty-third year, the sequel to a painful accident. His career forms an intimate part of the Meiji epoch in Japanese history. At the age of seventeen, two years before the Restoration, he was one of the first group of Japanese students sent to England by the Tokugawa Shogunate, for the purpose of studying the principles and methods of Occidental civilization. Recalled two years later, because of the outbreak of the civil war, Hayashi joined the forces of Admiral Viscount Inomoto, who established headquarters at the Hokkaido, where for a time he withstood the Imperial army. Obliged to surrender shortly, Hayashi with others was imprisoned. Later released, the young man taught English for a time in a private school in Yokohama, and subsequently became a translator at the American legation. In 1871 Count Mutsu was appointed governor of Kanagawa-ken, and Hayashi became his chief secretary. Thus began his official service under the Meiji government, a service which continued, with brief occasional interruptions, until

his death, with a steady augmentation of influence and power. Very shortly he was transferred to the Foreign Office, and later attached to the suite of Prince Iwakura, the first foreign envoy ever sent out by Japan. Others in the suite were Prince Ito and Prince Okubo; and the most notable group of statesmen ever sent abroad by Japan made a memorable tour of the United States and Europe.

Upon his return, Count Hayashi was made governor of Hyogo-ken; and in 1891 he became Vice Minister for Foreign Affairs under Count Mutsu. In 1896, he was placed in charge of the legation at Peking. Later he was sent by his government to represent it at St. Petersburg, and still later he succeeded Baron Kato as the Minister to Great Britain. Returning again to the Foreign Office for a time, he was sent again to London after the war with Russia, as Japan's first Ambassador to Great Britain. He was recalled in 1906 to assume the post of Minister of Foreign Affairs and premier of the government. Resigning with his colleagues in 1908, Count Hayashi again became a member of the cabinet in 1911, when Marquis Saionji formed his third ministry, this time as Minister for the Department of Communications, which post he recently resigned, with his colleagues, upon another change of government.

Undoubtedly the greatest service which Count Hayashi rendered his country, and that for which he will be most honored in the history of Japan, was in connection with the negotiation of the treaty between Japan and Great Britain, known as the Anglo-Japanese Alliance, while he was the Japanese Minister at the Court of St. James. It was an instrument which has affected the future diplomatic relations between the Occident and the Orient more potentially, perhaps, than any treaty yet made; and it is the large part which Count Hayashi played in this difficult negotiation which insures his permanent place in the roll of Japanese statesmen and in the diplomatic history of the world.

Count Hayashi was not only an astute and successful diplomatist, but a student of remarkable attainments, and of fine literary tastes. While in England, he translated a history of Italy, and at a later date, he translated Mill's *Political Economy*. His subsequent writings embody many contributions to the history of the early days of the Meiji era. His career furnishes another instance of the debt which Japan owes to those of her sons who qualified themselves for their service to the nation by educational training either in Europe or the United States.

THE SECOND INTERNATIONAL OPIUM CONFERENCE

The Second International Opium Conference was held at The Hague from July 1 to July 9, 1913, and the report of the American delegation, prepared by Dr. Hamilton Wright, was transmitted to Congress by the President on August 9th last and is now available to the public.¹ The history of the recent world-wide movement to suppress the opium traffic, and the results accomplished by the International Opium Commission, which met at Shanghai, China, in February, 1909, and the First International Opium Conference, which convened at The Hague, December 1, 1911, and adjourned January 23, 1912, have been exhaustively treated in articles written by Dr. Wright, and printed in this JOURNAL for July and October, 1909, October, 1912, and January, 1913. An editorial comment in the April, 1911, issue, page 466, also deals with the subject. It is therefore not necessary to recount to readers of the JOURNAL the various steps already taken in the movement.

It will be recalled that at the First International Opium Conference, only 12 Powers, namely, Germany, the United States, China, France, Great Britain, Italy, Japan, the Netherlands, Persia, Portugal, Russia, and Siam, were represented, these being the countries which participated in the work of the International Opium Commission of 1909. The convention adopted at the First Opium Conference was signed by these 12 Powers only; but, appreciating that a convention of such limited scope would not be very effective in bringing about the reforms contemplated, a provision was inserted in the convention under which any Power should be allowed to sign it, although not represented at the Opium Conference. Furthermore, the convention laid upon the Netherland Government the duty of inviting all the Powers of Europe and America which did not take part in the conference to sign the convention. It was then provided that, if all the Powers invited had not signed by December 31, 1912, the delegates of the signatory Powers should assemble at The Hague to consider the possibility of depositing their ratifications, notwithstanding this lack of signatures of some of the Powers.

The Government of the United States was formally requested by the Netherland Government to assist in securing the signatures of the Latin American states to the convention. To this request the American

¹ Senate Document No. 157, 63d Cong., 1st Sess.

Government cordially assented, and by the end of 1912 all of the Latin American states, with the exception of Peru and Uruguay, had either signed or signified their intention to sign the convention. The efforts of the Netherland Government to secure the signatures of European states were not, however, so successful, for the signatures of the following countries had not been obtained on the date specified in the convention, namely, Austria-Hungary, Bulgaria, Greece, Montenegro, Norway, Roumania, Servia, Sweden, Switzerland, and Turkey. Therefore, on February 4, 1913, the Government of the Netherlands, in pursuance of Article 23 of the International Opium Convention, invited the signatory states to designate delegates to assemble at The Hague and consider whether it was possible to deposit their instruments of ratification. The invitation was accepted, and the Second International Opium Conference was convened at The Hague on July 1, 1913.

Upon the opening of the conference, the Netherland Government announced the following signatures to the International Opium Convention: Germany, the United States, Argentina, Belgium, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Guatemala, Haiti, Holland, Honduras, Italy, Japan, Luxemburg, Mexico, Nicaragua, Panama, Paraguay, Persia, Portugal, Russia, Salvador, Siam, and Venezuela. All were represented in the conference except Bolivia, Cuba, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Persia, and Venezuela.

The following memorandum was laid before the conference by the Netherland Government, giving the reasons why each of the nonsignatory Powers had not signed the convention:²

**POWERS THAT HAVE NOT SIGNED THE INTERNATIONAL OPIUM CONVENTION, WITH
REASONS THEREFOR**

AUSTRIA-HUNGARY

From a communication of the imperial and royal ministry of foreign affairs at Vienna, dated March 11, 1913, it appears that the question of signing the opium convention, which would be done by Austria-Hungary for humane motives only, was still under discussion. Inasmuch as the provisions of the said convention and the Austrian and Hungarian laws on the subject had to be harmonized, adhesion could not be declared for some time.

² Quoted from report of Dr. Wright, pp. 13-16.

BULGARIA

The minister for foreign affairs at Sofia informed the minister of the Netherlands at Constantinople, under date of August 6-19, 1912, that Bulgaria would sign the International Opium Convention. This, however, has not as yet been done.

GREECE

On September 7, 1912, the royal ministry for foreign affairs at Athens informed the legation of the Netherlands there that the Hellenic Government did not intend to sign the International Opium Convention.

MONTENEGRO

The Montenegrin Government has not yet made any reply to the reiterated request of the Government of the Netherlands that it sign the convention.

NORWAY

The ministry for foreign affairs at Christiania informed the minister of the Netherlands on October 8, 1912, that the Norwegian Government, while earnestly desirous of joining in that humane endeavor to suppress the improper use of opium and its derivatives, regretted its inability to sign the convention for the present, as its adhesion would make new legislation necessary. The minister added that the Norwegian Government proposed, nevertheless, to take under advisement, at the earliest possible moment, the question of enacting new laws that would permit of its adhering to the aforesaid convention.

PERU

The Peruvian Government has not, as yet, made any reply to the reiterated request of the Government of the Netherlands that it sign the convention.

ROUMANIA

By a note of February 25, 1913, the minister for foreign affairs at Bucharest informed the minister of the Netherlands at that city that the acts of the International Opium Conference had been referred to the proper Roumanian department for examination in order to enable the Royal Government to decide whether it would be expedient for it to sign the convention. The minister added that the Roumanian Government was unable at that time either accurately to state when the examination would be completed or to prejudge its decision.

SERVIA

The Servian Government has not as yet made any reply to the reiterated request of the Government of the Netherlands that it sign the convention.

SWEDEN

The Swedish Government has not yet officially answered the Netherlands Government's invitation to sign the convention.

SWITZERLAND

See the letter of October 25, 1912, from the Federal Council.*

* BERNE, October 25, 1912.

Mr. CHARGÉ D'AFFAIRES:

With a note of February 26 last, H. E. Mr. van Panhuys was pleased to transmit to us the text of the International Opium Convention concluded at The Hague on January 25, 1912, by the representatives of twelve Powers, viz.: Germany, China, the United States of America, France, Great Britain, Italy, Japan, the Netherlands, Persia, Portugal, Russia, and Siam. At the same time we were requested by the Netherlands Government to have Switzerland adhere to the convention and designate a delegate to sign the protocol of signature which is kept open at The Hague by virtue of article 22 of the convention.

We acquainted ourselves with and took the most lively interest in the documents that were submitted to us, and we admit our high appreciation of the moral and social motives that led to the conclusion of the new convention. We hold, nevertheless, that the coöperation that Switzerland could afford to the contracting States would amount to next to nothing, and we consider this circumstance as making it superfluous for us to adhere to the opium convention.

Indeed, Switzerland, not being an opium-producing country, does not export the drug, and therefore has no occasion to regulate and supervise the trade; besides, the use of opium otherwise than as a medicine has not as yet found its way in our midst, and the habits of our people do not leave much room for foreseeing a change in that respect. Finally, the use of opium and its alkaloids—as also that of cocaine—as medicine is strictly regulated by our National Pharmacopœia and cantonal laws. So much so that we do not think that any one can go further in that direction than we have. As for the few chemical works that are preparing morphine and cocaine, their supervision is within the province of cantonal authorities, and the Federal power is at present without authority to regulate the matter.

We therefore hold, as we said above, that Switzerland's adhesion to the opium convention could serve no useful purpose under existing conditions, and we beg you so to inform your Government while conveying to it our very warm thanks for the invitation it was pleased to extend to us.

Be pleased to accept, Mr. Chargé d'Affaires, the assurances of our high consideration.

In the name of the Swiss Federal Council.

FORER,
President of the Confederation.
SCHATZMANN,
Chancellor of the Confederation.

Mr. MOSELmans,
Chargé d'Affaires of the Netherlands, Berne.

TURKEY

See letter of November 30, 1912, from H. E. Mr. Gabriel Noradounghian.*

URUGUAY

The minister for foreign affairs at Montevideo informed, under date of February 1, 1913, the minister of the Netherlands that the Government of Uruguay would sign the convention. This, however, has not yet been done.

The conference concerned itself mainly with two questions: First, the deposit of ratifications of the International Opium Convention by the Powers represented at the conference; and, secondly, the means of overcoming the objections and securing the signatures of the nonsignatory Powers. The first seven days of the conference were devoted to a consideration of the latter question by informal discussion. These discussions resulted in the presentation on July 7th of a resolution agreed upon by the delegations of Germany, the United States, France, Great Britain, the Netherlands, and Russia, which resolution reads as follows:³

PROPOSED RESOLUTION PRESENTED BY THE DELEGATIONS OF GERMANY, UNITED STATES OF AMERICA, FRANCE, GREAT BRITAIN, THE NETHERLANDS AND RUSSIA

PREAMBLE

The First Opium Conference, in which 12 States participated, requested the Government of the Netherlands to invite the 34 powers of Europe and America, enumerated in article 22 of the international convention of January 23, 1912, to sign this convention. Of these 34 powers 22 have signed the "Protocol of signature of the powers not represented at the conference." There remained, therefore, 12 powers who, for different reasons, have not considered it possible so to do. It appears from

* SUBLIME PORTE,
November 30, 1912.

Mr. ENVOY:

I have had the honor to receive the two notes, Nos. 400 and 1445-41, dated March 4 and October 4, 1912, in which your excellency expressed the hope that the Ottoman Government would give its adhesion to the International Opium Convention of January 23, 1912.

I regret to have to inform your excellency that the reasons of a financial character which prevented the Imperial Government from participating in the conference held at The Hague for that purpose also prompt it not to adhere to the convention there drawn up in which it did not coöperate.

Be pleased, etc.,

GABRIEL NORADOUNGHAN.

His Excellency Mr. JONKHEER VAN DER DOES DE WILLEBOIS,
*Envoy Extraordinary and Minister Plenipotentiary of Her Majesty
the Queen of the Netherlands.*

³ Quoted from report of Dr. Wright, pp. 17-19.

the replies received by the Netherlands Government and communicated to the conference that but 3 powers of these 12 have declined to sign the convention, *i. e.*, Greece, Switzerland, and Turkey.

While Greece and Turkey have not given the reasons for their refusal, Switzerland has observed that, while fully recognizing the motives of moral and social order which led to the conclusion of the convention, the coöperation that Switzerland could lend to the contracting States would amount to almost nothing. The Federal Council based its opinion upon the facts that Switzerland, not being a country which produces opium, does not export this drug, and that, as yet, opium was not used there other than medicinally. It added that the use of opium and of its alkaloids—and also the use of cocaine—for medicinal purposes is strictly regulated by the National Pharmacopœia and by the district laws. It was also of the opinion that it was not possible to proceed further in this connection than had already been done. As regards certain producers of chemical products established in Swiss territory and manufacturing morphine and cocaine, their supervision appertained to the district authorities and the Federal Government was in no way authorized at present to regulate this matter.

Three powers: Austria-Hungary, Norway, and Sweden have replied that as the stipulations of the convention necessitate new legislation, they must withhold their signatures.

Two countries, Bulgaria and Uruguay, have agreed to sign but their signatures have not as yet occurred.

The Roumanian Government, having as yet not concluded its examination of the findings of the conference, is not able to respond.

Montenegro, Peru, and Servia have not replied to the repeated invitation of the Government of the Netherlands.

The replies of some of the powers indicate that misunderstandings exist regarding the stipulations and the object of the convention which will not be impossible of clarification.

The delegations of Germany, the United States of America, France, Great Britain, the Netherlands, and Russia, inspired by their desire to facilitate these clarifications, and hoping not only to elicit replies from such Governments as have not as yet responded, but also to induce the Governments who have heretofore refused to sign to reconsider their refusal, have the honor to propose the following resolution:

RESOLUTION

Desirous of following up in the path opened by the international commission of Shanghai of 1909 and the first conference of 1912 at The Hague, the progressive suppression of the abuse of opium, morphine, cocaine, as well as of drugs prepared with or derived from those substances, and deeming it more than ever necessary and mutually advantageous to have an international agreement on that point, the Second International Conference—

1. Utters a wish that the Government of the Netherlands be pleased to call to the attention of the Governments of Austria-Hungary, Norway, and Sweden the fact that the signature, ratification, drawing up of legislative measures and putting the convention into force constitute four distinct stages which permit of those powers giving their supplemental signature even now.

Indeed, it is seen from articles 23 and 24 that a period of six months is allowed to run between the going into effect of the convention and the drawing up of the bills, regulations, and other measures contemplated in the convention. Furthermore, the third paragraph of article 24 gives the contracting powers the liberty to reach an agreement, after ratification, upon the date on which the said legislative measures shall go into effect. Besides, we can not refrain from remarking that the difficulties foreseen by Austria-Hungary, Norway, and Sweden with respect to their legislation were not unknown to the delegates of the signatory powers and were subjected to thorough consideration on the part of the twelve contracting powers. Nearly all the signatory powers are in the same situation as the above-mentioned Governments and have not yet elaborated all the bills contemplated by the convention.

2. Utters the wish that the Government of the Netherlands be pleased to communicate to the Governments of Bulgaria, Greece, Montenegro, Peru, Roumania, Servia, Turkey, and Uruguay the following resolution:

The conference regrets that some Governments have refused or neglected to sign the convention as yet. The conference is of opinion that the abstention of those powers would prove a most serious obstruction to the humane purposes aimed at by the convention. The conference expresses its firm hope that those powers will desist from their negative or dilatory attitude.

3. Utters the wish that the Government of the Netherlands be pleased to point out to the Helvetic Government its error in deeming its coöperation to be of hardly any value. Contrary to what is said in the Federal Council's letter of October 25, 1912, the conference holds that Switzerland's coöperation would be most serviceable in its effect, whereas her abstention would jeopardize the results of the convention. As to the question raised by the Federal Council concerning the respective powers of the Federal and Canton Legislatures it is to be noted that similar difficulties were already considered by the first conference which took them into account in wording the convention.

4. Requests the signatory Governments to instruct their representatives abroad to uphold the above-indicated action of their Netherland colleagues.

5. Utters the wish that in case the signature of all the powers invited by virtue of paragraph 1 of article 23 shall not have been secured by the 31st of December, 1913, the Government of the Netherlands will immediately invite the signatory powers on that date to designate delegates to take up the question whether it is possible to put the International Opium Convention of January 23, 1912, into operation.

This resolution met with favor in the conference and was embodied in a *protocol de cloture* and signed by the delegates on July 9th.

On the question of the deposit of ratifications of the International Opium Convention, all the Powers represented agreed to proceed to the immediate deposit of ratifications, except Great Britain, Germany, and Portugal. It is understood that these governments withheld agreement to ratify until the signatures of certain other Powers are obtained.

During the sessions of the conference, both Peru and Uruguay signi-

fied their intention to sign and ratify the convention. According to Article 23, the convention does not come into force until three months after the deposit of ratifications by all the signatory Powers. Article 5 of the resolution adopted by the second conference, it will be noted, extends the time for securing additional signatures until December 31, 1913. If by that time all the Powers invited have not signed, the signatory Powers are requested again to send delegates to The Hague to consider whether it is possible to put the convention into operation.

The following table, prepared by Dr. Wright, American delegate, giving the result of the second conference with regard to signatures and ratifications, shows at a glance the present status of the convention:

MEMORANDUM FOR THE SECRETARY OF STATE ON THE PRESENT STATUS OF THE INTERNATIONAL OPIUM CONVENTION SIGNED AT THE HAGUE JANUARY 23, 1912, AND ON AGREEMENT TO DEPOSIT RATIFICATIONS AT THE HAGUE, MADE JULY 9, 1913.

The following powers have signed the convention:

Germany. ¹	Dominican Republic. ²	Nicaragua. ²
United States. ¹	Ecuador. ²	Panama. ²
Argentina. ²	Spain. ²	Paraguay. ²
Belgium. ²	France. ¹	Netherlands. ¹
Bolivia. ²	Great Britain. ¹	Persia. ¹
Brazil. ²	Guatemala. ²	Portugal. ¹
Chile. ²	Haiti. ²	Peru. ²
China. ¹	Honduras. ²	Russia. ¹
Colombia. ²	Italy. ¹	Salvador. ²
Costa Rica. ²	Japan. ¹	Siam. ¹
Cuba. ²	Luxemburg. ²	Venezuela. ¹
Denmark. ²	Mexico. ²	Uruguay. ¹
(Total, 36.)		

Of the foregoing nations the following have agreed to deposit ratifications, in accordance with article 23 of the convention:

United States.	Dominican Republic.	Mexico.
Argentina.	Ecuador.	Netherlands.
Belgium.	Spain.	Russia.
Brazil.	France.	Siam.
Chile.	Haiti.	Guatemala.
China.	Honduras.	Nicaragua.
Colombia.	Italy.	Venezuela.
Costa Rica.	Japan.	Peru.
Denmark.	Luxemburg.	Uruguay.
(Total, 27.)		

¹ Original signatories of the convention.

² Supplementary signatures, in accordance with article 22 of the convention.

The following signatory powers were represented at the conference, but reserved ratification until Austria-Hungary, Peru, and Switzerland have agreed to ratification. The chief difficulty of German ratification—Peru—has been removed. It was the general view of the conference that Austria-Hungary and Switzerland would sign and ratify in the near future, and that Great Britain would then agree to ratify. Portugal will undoubtedly agree to ratify.

Germany.
Great Britain.
Portugal.

The following signatory powers did not have representatives at The Hague, but are expected shortly to agree to deposit ratifications:

Bolivia.	Paraguay.
Cuba.	Persia.
Panama.	Salvador.
(Total, 6.)	

That is, the great majority of the signatories have agreed to ratify, and soon all signatories—36—will have agreed to ratify.

The following countries have not signed the convention, but by direction of the recent conference will be pressed to do so by an identic note to be presented at their foreign offices by the Netherlands minister supported by the ministers of the powers represented in the conference:

Bulgaria.	Norway.
Greece.	Sweden.
Turkey.	Roumania.
Switzerland.	Montenegro.
Austria-Hungary.	Servia.
(Total, 10.)	

NOTE.—All the powers who have signed and agreed to proceed to ratifications will do so without waiting upon the nonsignatory powers. It is expected by the Netherlands Government that all those nations which have agreed to ratify will have deposited their ratifications by December 31 next, and that before that date the most important of the nonsignatory powers will have adhered, thus enabling Great Britain and Germany to agree to ratification.

It is hoped that, after the years of attention which have been given to this subject and the great progress which has been made in securing the signatures of all but ten nations of the world to an international convention imposing, according to the American delegate, "strict international, and requiring equally strict domestic, laws for the relegation of opium and allied narcotics to strictly medical channels," nothing will be allowed to interfere with putting the convention into full force and

effect. The answers to the objections of the non-signatory Powers, embodied in the resolution of the second conference, seem to be reasonably calculated to remove those objections. In any event, the opposition of one or all of the 10 non-signatory Powers should not preclude the 36 signatories from making the convention operative as to them. The only large European country which has not signed is Austria-Hungary. Of the others, six are Balkan states, whose internal conditions have no doubt made it impossible to give proper consideration to the subject; two are the Scandinavian states of Norway and Sweden, and the remaining state, Switzerland.

In the meantime, the United States Government is proceeding to enact the legislation necessary to carry out on its part the stipulations of the convention. Bills with this aim in view have been passed by the House of Representatives, and the President in his message of August 9th earnestly urged the Congress to enact them into law as soon as possible during the present session.

CHRONICLE OF INTERNATIONAL EVENTS

WITH REFERENCES

Abbreviations: *Ann. sc. pol.*, Annales des sciences politiques, Paris; *Arch. dipl.*, Archives diplomatiques, Paris; *B.*, boletin, bulletin, bollettino; *B. Rel. Ext.*, Boletin de Relaciones Exteriores; *Clunet*, Journal de droit international privé, Paris; *Cd.*, Great Britain, Parliamentary Papers-Command Papers; *Corresp.*, Le correspondant, Paris; *Doc. dipl.*, France, Documents diplomatiques; *Dr.*, droit, diritto, derecho; *D. O.*, Diario Oficial; *Ga.*, gazette, gaceta, gazzetta; *G. B. Treaty Series*, Great Britain, Treaty Series; *Herald*, New York Herald; *Ind.*, Independent; *Int.*, International, internationale, internazionale; *J.*, Journal; *J. O.*, France, Journal Officiel; *M.*, Magazine, magasin, etc.; *Martens*, Nouveau recueil général de traités, Leipzig; *P. A. U.*, Bulletin of the Pan-American Union; Washington; *Mém. dipl.*, Mémorial diplomatique, Paris; *Monit.*, Moniteur belge, Brussels; *Q. dipl.*, Questions diplomatiques et coloniales, Paris; *R.*, review, revista, rivista, revue; *Reichs-G.*, Germany, Reichsgesetzblatt; *R. de dr. int. et de légis. comp.*, Revue de droit international et de législation comparée, Paris; *R. de dr. int. et dip.*, Revue de droit international et diplomatique, Tokyo; *R. gén. de dr. int. pub.*, Revue générale de droit international public, Paris; *R. pol. et parl.*, Revue politique et parlementaire, Paris; *Staats.*, Netherlands, Staatsblad; *Times*, London Times; *U. S. Treaty Series*, United States, Treaty Series; *Z. f. Völkerrecht*, Zeitschrift für Völkerrecht und Bundesstaatsrecht, Breslau; *Z. f. Int. Recht*, Zeitschrift für Internationales Recht, Leipzig.

August, 1909.

- 20 ITALY. Decree regulating sojourn of ships in fortified places of Italian littoral in time of war. *Ga. Ufficiale*, 1909, 232; *R. gén. de dr. int. pub.*, 20: doc.:59.

October, 1909.

- 30 NETHERLANDS. Ordinance concerning entrance of foreign warships into Dutch territorial waters. *Staats.*, 1909, No. 351; *R. gén. de dr. int. pub.*, 20: doc.:61.

July, 1910.

- 26 GERMANY. Regulation concerning entrance of foreign war-ships into ports and territorial waters of Germany, modifying law of May 16, 1877. *Marine Verordnungs-Blatt*, 1877, No. 11, and 1910, No. 15; *R. gén. de dr. int. pub.*, 20: doc.:50.

August, 1910.

- 19 AUSTRIA. Regulations modifying regulations of March 1, 1901, relating to merchant ships which have been converted into war ships, at anchor before Austro-Hungarian fortifications. *Oesterreichisches Reichs-G., 1901*, No. 8, and *1910*, No. 65; *R. gén. de dr. int. pub.*, 20: doc.:53.

September, 1910.

- 6 GREAT BRITAIN—HONDURAS. Withdrawal of Great Britain for Victoria from treaty of commerce signed January 21, 1887. *G. B. Treaty series, 1913*, No. 9.

September, 1911.

- 29 FRANCE. Decree making applicable to New Caledonia Arts. 2 to 10 of law of March 1, 1888, forbidding foreigners the right to fish in territorial waters. *R. gén. de dr. int. pub.*, 20: doc.:41; *J. O.*, 1911, 7856.

January, 1912.

- 26 NORWAY—RUSSIA—SWEDEN. Convention signed relating to the government, etc., of Spitzbergen. Norway and Sweden established a colony at Spitzbergen in 1871, with the consent of the Powers, Russia alone protesting. By an exchange of notes in 1872 Russia agreed to the occupation. Upon the separation of Norway and Sweden in 1905, the question of the government of Spitzbergen was raised. A conference met at Christiania July 16, 1910, and Spitzbergen was declared neutral territory, open to all nations. An international commission was formed called the "Commission of Spitzbergen." A project for the government has since been in formation, and on January 26, 1912, the following delegates met at Christiania: For Norway, M. Francis Hagerup and M. John Herman Wollebeck; for Russia, M. A. Krouvensky and Baron Boris Nolde; for Sweden, M. Adam G. de Falkenberg and M. L. Hj. Hammarskjöld. A project of a treaty was adopted, as well as a project providing for the status of land held prior to the signing of the treaty which created the commission. The conference adjourned to meet in June, 1912, but this meeting was not held. French text of project of new treaty adopted and additional project: *R. gén. de dr. int. pub.*, 20:282.

February, 1912.

- 18 GREAT BRITAIN—PERSIA—RUSSIA. Exchange of notes, relating to re-establishment and maintenance of order in Persia, dated February 18 and March 20, 1912. Also note addressed in common by Great Britain and Russia to Persia on September 11, 1907. French and English texts: *Martens*, 7:18, 19; English text: *Cd.*, 6077, 6103.

April, 1912.

- 22 BELGIUM—FRANCE. Arrangement relating to right of France to preference in territories of Congo state. Declarations relative to delimitation in Stanley Pool and between Manyanga and the Ocean. Signed at Brussels, Dec. 22 and 23, 1908, and April 22, 1912. French texts: *Mém. dipl.*, 50:266.
- 22 BOLIVIA—GREAT BRITAIN. Accession of various British possessions to treaty of commerce signed August 1, 1911, ratifications of which were exchanged July 5, 1912. *G. B. Treaty series, 1912*, No. 17, and *1913*, No. 9.

May, 1912.

- 30 FRANCE—MOROCCO. Treaty signed at Fez. Spanish text: *B. Rel. Ext. (Mexico)*, 35:343.

July, 1912.

- 5 INTERNATIONAL RADIOTELEGRAPH CONVENTION signed at London. The date of signature was incorrectly given as July 12. See *this Journal* 7:595. French and German texts: *Z. f. Völkerrecht*, 7:165.
- 25 PANAMA—SPAIN. Literary, scientific and artistic property convention signed; approved by Panama November 19, 1912; ratifications exchanged May 3, 1913; went into effect July 1, 1913. French text: *Dr. d'Auteur*, 16:94; *Ga. de Madrid*, June 1, 1913.

August, 1912.

- 3 FRANCE—SWITZERLAND. By an exchange of notes dated November 18, 1910 France and Switzerland agreed to submit to arbitration the interpretation of their commercial agreement of October 20, 1906. The tribunal was composed as follows: For

August, 1912.

Switzerland, M. Eugène Borel; for France, M. Plichon, who was later replaced by M. Nöel; *sur-arbitre* and president, Lord Reay of England. French text: *Martens*, 7:193.

October, 1912.

- 16 GREAT BRITAIN—GREECE. Withdrawal of Great Britain for Papua from treaty of commerce of November 10 (22), 1886. To take effect October 16, 1913. *G. B. Treaty series, 1913*, No. 9.
- 18 FRANCE. Decree declaring the neutrality of France in maritime war. French text: *Martens*, 7:79, and *J. O., 1912*, 286, 293.
- 19 BOLIVIA—COLOMBIA. Decree promulgating treaty of friendship signed March 19, 1912. Spanish text: *B. Rel. Ext. (Colombia)*, 4:923.
- 19 COLOMBIA—GREAT BRITAIN. Decree of Colombia promulgating treaty signed August 20, 1912, extending terms of the commercial treaty of February 16, 1866 to Canada, South Africa, Australia, New Zealand and Newfoundland. *B. Rel. Ext. (Colombia)*, 4:921.
- 21 MEXICO—PERU. Peru recognized the Huerta Government in Mexico. *B. Rel. Ext. (Mexico)*, 36:101.

November, 1912.

- 6 ARGENTINE REPUBLIC—COLOMBIA. Decree of Colombia promulgating treaty of general arbitration signed at Washington, January 20, 1912. Spanish text: *B. Rel. Ext. (Colombia)*, 4:931.
- 6 BOLIVIA—COLOMBIA. Decree of Colombia promulgating treaty relating to the exchange of publications signed June 15, 1912. Spanish text: *B. Rel. Ext. (Colombia)*, 4:929.
- 14 GREAT BRITAIN—PARAGUAY. Withdrawal of Great Britain for Papua from treaty of commerce signed October 16, 1884. To take effect November 14, 1913. *G. B. Treaty series, 1913*, No. 9.
- 18 ARGENTINE REPUBLIC—GREAT BRITAIN. Parcel post convention signed. Spanish text: *B. Rel. Ext. (Argentine Republic)*, 38:369.
- 19 BOLIVIA—GREAT BRITAIN. Accession of Newfoundland to treaty of commerce signed August 1, 1911, ratifications of which were ex-

November, 1912.

changed July 5, 1912. *G. B. Treaty series, 1912*, No. 17 and 1913, No. 9.

- 22 ROUMANIA. Decree regulating entrance and sojourn of foreign war ships in Roumanian ports. The following states have adopted similar rules in conformity with the recommendation of the *Institut de droit international* at its session at The Hague in 1898: Belgium, 1901; Denmark, 1912; France, 1909, 1912; Italy, 1909; Sweden, 1904, 1905, 1912; Norway, 1906, 1912; Netherlands, 1909. French text of Roumanian decree: *R. gén. de dr. int. pub.*, 20:295.
- 23 EGYPT—GREAT BRITAIN. Withdrawal of Great Britain for Papua from commercial convention signed October 29, 1889. To take effect November 23, 1913. *G. B. Treaty series, 1913*, No. 9.
- 28 FRANCE—GREAT BRITAIN. Withdrawal of Great Britain for Australia, Norfolk Island and Papua from additional articles to treaty of commerce of January 26, 1826. To take effect November 28, 1913. *G. B. Treaty series, 1913*, No. 9.

December, 1912.

- 21 GREAT BRITAIN—LIBERIA. Withdrawal of Great Britain for Norfolk Island, and Papua from the treaty of commerce signed November 21, 1849, to take effect December 21, 1913. *G. B. Treaty series, 1913*, No. 9.
- 21 NETHERLANDS. Decree according customs exemptions for articles imported for the Hague Peace Palace. *Martens*, 7:90.

January, 1913.

- 1 RUSSIA—UNITED STATES. Commercial treaty expired. Russia has officially announced that minimum rates would be continued in effect. *R. of R.* (New York), 47:166.
- 3 NETHERLANDS—SWITZERLAND. Exchange of ratifications of treaty regulating the repatriation of citizens of each contracting state expelled from the territory of the other party, signed May 7, 1910. French and Dutch texts: *Martens*, 7:284.
- 11 FRANCE. Decree modifying the decree of February 28, 1901 regulating the status of French citizens living in the islands and lands in the Pacific Ocean not belonging to France nor to any other civilized state. *R. gén. de dr. int. pub.*, 20: doc. 40.

January, 1913.

- 22 INTERNATIONAL INSTITUTE OF PEACE organized at Paris. *Mém. dipl.*, 51:116.
- 26 CUBA—VENEZUELA. Venezuelan decree carrying into effect the extradition treaty signed July 14, 1910. Ratifications exchanged December 20, 1912. Spanish text: *B. Rel. Ext.* (Venezuela), 4:388.
- 30 BULGARIA—ROUMANIA. Protocol signed at London stating Roumanian demands and Bulgarian concessions. *Q. dipl.*, 35:243.
- 31 FRANCE—NETHERLANDS. Dutch decree carrying into effect the convention relating to telephone communication between France and Netherlands, via Belgium, signed September 15, 1911. French and Dutch texts: *Staats.*, 1913, No. 46.

February, 1913.

- 3 NICARAGUA—UNITED STATES. The treaty relating to the inter-oceanic canal, rights of the United States to certain lands, etc., which was signed February 3, 1913, and approved by the Nicaraguan Congress February 27, 1913, was sent to the United States Senate February 23, 1913. Before action was taken by the Senate the Secretary of State of the United States conferred with the Senate Committee on Foreign Relations as to the desirability of recommending the ratification of the treaty in an amended form. The projected amendments were to place Nicaragua virtually under the protectorate of the United States, making the Platt Amendment relating to Cuba also applicable in regard to Nicaragua. These amendments were never actually added to the treaty and submitted to the Senate although it was understood that they were acceptable to the Nicaraguan Government. The treaty as originally signed and ratified by Nicaragua has since been withdrawn from the Senate. This *Journal*, 7:595; *Washington Post*, June 8, July 20, 1913. *Ind.*, 75:228, 285.
- 11 MEXICO—SALVADOR. Salvador recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), 36:6.
- 13—March 21. GREAT BRITAIN—HONDURAS. Exchange of notes extending until April 4, 1915, the operation of the treaty of commerce and navigation signed January 21, 1887. *G. B. Treaty series*, 1913, No. 12.
- 14 GREAT BRITAIN. Act modifying the Act of June 2, 1911, regulating

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aerial navigation and relating to the protection of secrets of national defense. *Great Britain Aerial Navigation Act, 1913; R. gén. de dr. int. pub., 20: doc. 46, 47.*

- 15-28. GERMANY—RUSSIA. Convention for the protection of literary and artistic property. German decree promulgating the convention dated May 14, 1913. German and French texts: *Reichs-G., 1913, 301*; French text: *Dr. d'Auteur, 26:121.*

March, 1913.

- 3 GREAT BRITAIN—JAPAN. Accession of Great Britain for Ceylon and Straits Settlements to treaty of commerce signed April 3, 1911, subject to general exceptions as to Articles 1 and 8. *G. B. Treaty series, 1911, No. 15, 1913, No. 9.*
- 11 GERMANY—GREAT BRITAIN. Agreement respecting the settlement of the frontier between Nigeria and the Cameroons from Yola to the sea; and the regulation of navigation on the Cross river. German and English texts. *G. B. Treaty series, 1913, No. 12.*
- 14 BRAZIL—GREAT BRITAIN. Denunciation by Brazil of extradition treaty of November 13, 1872, to take effect September 14, 1913. *G. B. Treaty series, 1913, No. 9.*
- 26 PARAGUAY—UNITED STATES. Extradition treaty signed.
- 28 GUATEMALA—MEXICO. Guatemala recognized the Huerta government in Mexico. *B. Rel. Ext. (Mexico), 36:4.*
- 31 GREAT BRITAIN—MEXICO. Great Britain recognized the Huerta government in Mexico. *B. Rel. Ext. (Mexico), 36:2.*

April, 1913.

- 3 FRANCE—SPAIN. French decree carrying into effect the treaty relating to Morocco, signed November 27, 1912. French text: *Mém. dipl., 51:246.*
- 5 FRANCE—MEXICO. France recognized the Huerta government in Mexico. *B. Rel. Ext. (Mexico), 36:3.*
- 9 CHINA—MEXICO. China recognized the Huerta government in Mexico. *B. Rel. Ext. (Mexico), 36:8.*
- 13 GREAT BRITAIN—MEXICO. Withdrawal by Great Britain for Natal, Transvaal, Orange Free State, Norfolk Island and Papua from treaty of commerce signed November 27, 1888. *G. B. Treaty series, 1913, No. 9.*

April, 1913.

- 15 COLOMBIA—GREAT BRITAIN. Withdrawal by Great Britain for Australia, Norfolk Island and Papua from treaty of commerce signed February 16, 1866, to take effect April 14, 1914. *G. B. Treaty series, 1913*, No. 9.
- 17 FRANCE. French decree promulgating the agreement signed June 2, 1911, by Brazil, Cuba, Spain, France, Great Britain, Portugal, Switzerland and Tunis, modifying the trade-mark arrangement signed at Madrid, April 14, 1891. French text: *Arch. dipl.*, 126:86.
- 22 GREAT BRITAIN—JAPAN. Accession by Great Britain for various protectorates and possessions to treaty of commerce signed April 3, 1911, subject to general exceptions as to Articles 1 and 6. *G. B. Treaty series, 1912*, No. 15 and *1913*, No. 9.
- 25 MEXICO—TURKEY. Exchange of ratifications of consular convention signed December 23, 1912. *B. Rel. Ext.* (Mexico), 36:13.
- 28 MEXICO—SPAIN. Spain recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), 36:98.
- 30 AUSTRIA—HUNGARY—MEXICO. Austria-Hungary recognized the Huerta government in Mexico. *B. Rel. Ext.* (Mexico), 36:5.

May, 1913.

- 1 GREAT BRITAIN—JAPAN. Accession by Great Britain for Canada to the treaty of commerce of April 3, 1911. This accession is subject to the following conditions:

(1) Nothing in said treaty shall be deemed to affect any of the provisions of the present Immigration Act of Canada. (2) Article 8 of said treaty shall be deemed not to apply to Canada. It is understood that the Imperial Japanese government are fully prepared to maintain, and intend to maintain, with equal effectiveness, the limitation and control which they have since 1908 exercised in the regulation of immigration from Japan to Canada.

The accession of Canada and other British possessions and protectorates is subject generally to the following interpretation placed on Articles 1 and 8 of the treaty (Exchange of notes with the Japanese Ambassador at London, July 17, September 10, 1912): "The provisions of Article 1 do not interfere with any immigration legislation of either of the contracting parties and

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does not differentiate against the subjects of either contracting party as compared with the subjects or citizens of the most favored nation. Article 8 mentions the 'United Kingdom and Japan' by name, while the other clauses of the treaty generally refer to the 'High Contracting Parties.' It is understood therefore that the provisions of Article 8 do not apply to any of His Majesty's dominions, colonies, possessions or protectorates beyond the seas, to which the treaty has been, or may be made applicable under the provisions of Article 26." *G. B. Treaty series, 1911*, No. 15 and *1913*, No. 9.

- 1 COSTA-RICA—PANAMA. Honorable Chandler P. Anderson, formerly Counselor for the Department of State, succeeded the Honorable John Bassett Moore as counsel for Costa Rica to present its case in the boundary arbitration with Panama before Chief Justice White of the United States Supreme Court, under the treaty of March 17, 1910.
- 5 FRANCE. Project of a law regulating aerial navigation, presented to the French Chamber of Deputies. *R. gén. de dr. int. pub.*, 20: doc.:442.
- 5 CUBA. Decree carrying into effect the adhesion of Cuba to International Opium Convention signed, with supplementary protocol, Jan. 23, 1912. *Ga. Oficial* (Cuba), May 10, 1913.
- 13-17 INTERNATIONAL COMMITTEE ON MARITIME LAW met at Copenhagen. *Z. f. Völkerrecht*, 7:224.
- 14 MEXICO—MONTENEGRO. Montenegro recognized the Huerta Government in Mexico. *B. Rel. Ext.* (Mexico), 36:100.
- 16 GREAT BRITAIN—NORWAY. Convention respecting the application of the convention of commerce and navigation of March 18, 1826, to certain parts of His Britannic Majesty's dominions. Ratifications exchanged at Christiania, September 8, 1913. English and Norwegian texts: *G. B. Treaty series, 1913*, No. 14.
- 18 GERMANY—MEXICO. Germany recognized the Huerta government in Mexico. Announcement was not made until June 16. *B. Rel. Ext.* (Mexico), 36:99.
- 21 FRANCE. Decree regulating the entrance in time of peace of foreign war ships into the anchorages and ports of the French littoral and the countries under the protectorate of France. *J. O., 1913*, 5066, 5099.

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- 26 FRANCE. Decree regulating the entrance and sojourn, in time of war, of ships other than French war ships into the anchorages and ports of the French littoral and countries under the protectorate of France. *J. O.*, 1913, 5097, 5234; *R. gén. de dr. int. pub.*, 20: doc.:56.

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- 4 BRAZIL—JAPAN. Brazilian decree granting a concession to a Japanese syndicate, the "Colonization Company of Brazil." The syndicate is authorized to found Japanese colonies in the States of São Paulo, Rio de Janeiro and Minas Geraes. A seaport is to be built south of Iguape, to be inhabited by Japanese only. The Syndicate agrees to have 10,000 Japanese families living there within five years. It is the intention that the colonists remain quite by themselves. *Brazilian Decree*, No. 10, 248, dated June 4, 1913.
- 7 NETHERLANDS—NORWAY. Dutch decree carrying into effect the treaty of commerce and navigation signed May 20, 1912. French and Dutch texts: *Staats.*, 1913, No. 263.
- 14 GREAT BRITAIN—PORTUGAL. Agreement regulating opium monopolies in the colonies of Hong-Kong and Maçao. English and Portuguese texts: *G. B. Treaty series*, 1913, No. 11.
- 15-19. SECOND WORLD CONGRESS OF INTERNATIONAL ASSOCIATIONS met at Brussels. *Friedens-Warte*, 15:263.
- 20 BELGIUM. The Belgian Senate voted to reorganize the army upon a footing of 60,000 men in time of peace, with reserves of 200,000 men available. *Mém. dipl.*, 51:386.
- 23 FRANCE—ITALY. French decree promulgating the convention signed January 16, 1908, regulating the fisheries of the two nations between Corsica and Sardinia. *J. O.*, June 26, 1913.
- 29 BALKAN WAR. Second campaign. Actual warfare begun between Bulgaria and Servia and Greece.

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- 1 GREAT BRITAIN—ZANZIBAR. The administration of Zanzibar transferred from the British Foreign Office to the British Colonial Office. Zanzibar and Pemba were part of the area originally occupied by the British East Africa Company, and came under

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the British protectorate by the agreement of June 14, 1890, shortly before Heligoland was ceded to Germany and Madagascar to France. The protectorates on the mainland were transferred to the Colonial Office in 1905. The transfer of the administration is a sign that British control is to be exclusive and permanent.

1-9 **SECOND INTERNATIONAL OPIUM CONFERENCE** met at The Hague. This conference was called by the Netherland Government and the following countries were represented: Argentine Republic, Belgium, Brazil, Chile, China, Colombia, Costa Rica, Denmark, Dominican Republic, Ecuador, France, Germany, Great Britain, Haiti, Italy, Japan, Luxembourg, Mexico, The Netherlands, Portugal, Russia, Siam, Spain and the United States. The First Opium Conference met at The Hague from December 1, 1911 to January 23, 1912. This conference adopted a convention dealing with the obligations of the nations in the regulation of the sale of opium, which convention has been signed by all but 10 of the nations of the world, and an agreement to ratify it has been made by nearly all the signatory Powers. The United States signed the convention of 1912, and a bill to enact the proper legislation to carry it into effect was passed by the House of Representatives at the present session of Congress, and is now before the Senate. For report of the conference see: *Senate Document, No. 157, 63d Congress, 1st session.*

1 **BALKAN WAR.** Second campaign. Servia declared war on Bulgaria. Greece announced that a state of war existed but did not formally declare war. Roumania declared war on July 10. On July 6, Montenegro and Greece withdrew their ministers from Sofia. This war arose from the quarrels of the allies as to the division of the spoils won from Turkey in the first Balkan war. Bulgaria insisted on the division being in accordance with the secret Serbo-Bulgarian treaty of March 13, 1912. Servia objected in that nearly all the Servian share according to the Serbo-Bulgarian treaty was by the Treaty of London, signed May 30, 1913, formed into the State of Albania. On July 30 a peace conference met at Bucarest which declared a five-day truce. The Treaty of Bucarest, which ended the second campaign, was

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signed August 10, 1913. By this treaty Servia is given more than she claimed, and Bulgaria considerably less. In particular Salonika was desired by Bulgaria, but now goes to Greece, with the Bulgarian frontier fifty miles north. Bulgaria also desired to obtain the Macedonian territory, which the Powers prevented Bulgaria from taking, under the Treaty of San Stefano, by Russia and Turkey, March 3, 1878. This included Monastir and Ochrida, which the Treaty of Bucarest gives to Servia, and the Aegean coast near Salonika, which goes to Greece. It was necessary for the Treaty of Bucarest to be ratified by the Powers and this was formally done on August 30, 1913. English text: *Times*, August 11, 1913; English and French texts: *London, Daily Telegraph*, August 11, 1913; English summary of texts: *Herald*, August 11, 1913.

- 1 BULGARIA—GERMANY. German decree promulgating the consular convention signed September 29, 1911. German and Bulgarian texts: *Reichs-G., 1913*, 435.
- 1 BULGARIA—GERMANY. German decree promulgating convention concerning legal decrees and aids in civil actions, signed September 29, 1911. German and Bulgarian texts: *Reichs-G., 1913*, 468.
- 15 PERSIA—TURKEY. Agreement concluded on the question of the delimitation of the Turco-Persian frontier. It has been decided to appoint a commission composed of delegates of Turkey, Great Britain and Russia for the purpose of marking the boundary. *Times*, July 4, 1913.
- 3 ITALY—UNITED STATES. Treaty signed February 25, 1913, amending Article 3 of the treaty of commerce and navigation of February 26, 1871 ratified by the United States, March 1, 1913, and by Italy June 21, 1913; ratifications exchanged July 3; proclaimed by the United States July 3, 1913. The treaty gives the citizens of each country in the states and territories of the other, the same right of action enjoyed by nationals for death or injuries caused by negligence, provided they submit themselves to the conditions imposed upon nationals. Italian and English texts: *U. S. Treaty series*, No. 580.
- 3 GERMANY. The Bundesrat adopted the German Army Bill which increases the peace strength of the German Army by ap-

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- proximately 136,000 men. Measures for financing the increase were also adopted.
- 5 **BALKAN WAR.** Second campaign. France took the initiative in asking the Powers to make declarations in favor of a policy of non-intervention in the war between Bulgaria and Servia and Greece.
- 8 **EGYPT.** Lord Kitchner recommended the revision of the Egyptian capitulations. The question was raised by the arrest of a Russian political refugee—one Alexander Adamovitch,—by the Russian Consul at Alexandria and his delivery to the Russian police. Account of case: *Times*, July 16, 1913; *Cd. 6874*.
- 8 **CHINA—RUSSIA.** The Chinese House of Representatives voted to approve the treaty with Russia, provided it refers only to outer Mongolia. *Herald*, July 9, 1913. Exchange of notes, January 7 and 15, 1913: *Vie int.*, 3:243.
- 10 **CANADA—UNITED STATES.** It is reported from Ottawa that, unless the United States approves the regulations drawn up under the treaty negotiated with Canada in 1908 for the protection of inland fisheries in the boundary waters between the two countries, Canada will withdraw from the tentative agreement. The treaty in question was signed by Great Britain and the United States April 11, 1908, ratified by the President May 11, 1908 and proclaimed July 1, 1908. It provided for the appointment of a commission to be known as the International Fisheries Commission, consisting of one person named by each government. The original commissioners appointed were Dr. David Starr Jordan for the United States and Mr. Edward E. Prince, for Great Britain. It was the duty of the commission to draw up, within six months, a set of regulations for the protection and preservation of the fish in the prescribed waters. These regulations were drawn up and submitted to the United States Senate, but were never approved by the Senate and therefore never went into effect. Under Article VI, the treaty was effective for four years, and thereafter for a period of one year from date on which either party gives notice of its intention to withdraw. The present commissioners are: For the United States: Dr. Hugh M. Smith. For Great Britain: Mr. Edward E. Prince. English text: *Malloy: Treaties*, 1:827; *Times*, July 11, 1913.

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- 11 GUATEMALA—UNITED STATES. The Secretary of State of the United States announced that Guatemala has offered the United States five free scholarships in Guatemalan educational institutions, which are to be open to young men and women of the United States. The offer has been accepted and laid before the educational institutions of the United States.
- 15 CHINA—RUSSIA. Russia demanded of China the recognition of the full autonomy of Outer Mongolia, declaring China to be suzerain only and binding China to accept Russian intermediation and recognizing all the rights conceded to Russia by the Russo-Mongolian treaty signed at Urga, Oct. 21 (Nov. 3), 1912. These demands were submitted by Russia in place of the recently proposed agreement which had not been signed and which Russia now announces her unwillingness to sign. In the former agreement China consented to the Russo-Mongolian agreement and Russia disclaimed any intention to annex Mongolia, and offered good offices in the settlement of the existing differences and any other which might arise between China and Mongolia. The Chinese Senate has since rejected the proposed agreement.
- 16-19. THE THIRTY-THIRD CONGRESS OF THE INTERNATIONAL LITERARY AND ARTISTIC PROPERTY ASSOCIATION met at The Hague. *Dr. d'Auteur*, 26:106; *Vie int.*, 3:456.
- 23-26. INTERNATIONAL CONFERENCE FOR THE PROTECTION OF CHILDREN held at Brussels. Forty-one states sent delegates. An International Child Protection Office was established at Brussels. *Peace Movement*: 2:375; *Mouvement Pacifiste*, 2:367; *Friedens Bewegung*, 2:389.
- 27 FRANCE—GERMANY. Air traffic convention signed. Summary of text: *Times*, July 30, 1913.
- 29 DEATH OF DR. TOBIAS MICHAEL CAREL ASSER, honorary member of the American Society of International Law. Dr. Asser was born in 1838 in Amsterdam. He was one of the founders of the *Institut de droit international*, and also, with Professor Westlake and M. Rolin Jaequemyns, of the *Revue de droit international et de législation comparée*. For thirty-four years he was professor of law in the University of Amsterdam. He was a delegate from the Netherlands to the First and Second Hague Peace Conferences, a Minister of State and Member of the

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State Council of the Netherlands, and Member of the Permanent Court of Arbitration at The Hague. He acted as arbitrator in the Bering Sea dispute between the United States and Russia in 1901, and was President of the Tribunal in the first case to come before the Permanent Court of Arbitration at The Hague in the matter of the Pious Fund dispute between the United States and Mexico in 1902. In 1911, together with Alfred H. Fried, he was awarded the Nobel Peace Prize.

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- 4 MEXICO—UNITED STATES. The President of the United States accepted the resignation of Mr. Henry Lane Wilson, American Ambassador to Mexico, to take effect October 14, 1913. On August 9, Mr. John Lind, ex-Governor of Minnesota, was sent as the personal representative of the President to Mexico. On August 16, Señor Gamboa, Mexican Minister for Foreign Affairs, made an official reply to the proposals submitted to the Mexican Government by Mr. Lind. The President of the United States addressed Congress on August 27, proclaiming the strict neutrality of the United States and warning all Americans to leave Mexico. Appended to the address was the reply of Señor Gamboa. Congress passed a resolution appropriating money to pay the expenses of destitute Americans in leaving Mexico. Public Resolution No. 8, 63d Congress, 1st Session; United States Department of State, Mexican Affairs, *Address of the President of the United States, August 27, 1913.*
- 4-9 INSTITUT DE DROIT INTERNATIONAL. The twenty-sixth meeting of the Institut was held at Oxford, England. Professor Holland presided.
- 5 GERMANY. On April 18, 1913, Dr. Liebnicht, leader of the Social Democrats in Germany, made the assertion on the floor of the Reichstag that the Krupp agent in Berlin had been able, by bribing officers in the Ordnance Department, to obtain the secret plans of the German Government and to learn the armament bids of rival firms. He also alleged that the Krupps, with the connivance of the government, had fomented rumors of impending wars between Germany, France and England. The proof of this he claimed was in the safe of Herr von Dewitz, the

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Krupp representative in Berlin. The government was forced to take up the case, and on July 31, a court-martial was called for the trial of seven persons—four lieutenants and three non-commissioned officers of the Ordnance and Munitions Departments of the Ministry of War. The court-martial ended August 5, when those on trial were found guilty of having surrendered secrets affecting national defense. The civilians, Herr von Dewitz and Max Brandt, who are accused of bribing in the interests of the Krupps, served as witnesses and will be tried later in a civil court. *Times*, August 6 and 7, 1913.

- 7 SALVADOR—UNITED STATES. A treaty was signed which was drawn upon the lines of the "Peace Plan" proposed by the Secretary of State of the United States. The treaty provides (1) that all disputes of whatsoever nature, which diplomacy shall fail to adjust, shall be submitted to an international commission for investigation and report, and that neither party shall declare war during such investigation and report; (2) the International Commission shall consist of five members, one member to be chosen from each country by the government thereof, one member to be chosen by each country from a third country and the fifth member to be chosen by common agreement of the countries. The expenses of the commission are to be borne by the governments in equal shares, and the commission is to be appointed within four months after the ratification of the treaty; (3) either country may refer a dispute to the commission, or the commission may act on its own initiative and take up a dispute for adjustment. The report of the commission must be made within a year from the beginning of the investigation, unless the contracting parties extend the time by mutual agreement. The right to act independently on the subject-matter of the dispute is reserved by the parties. (4) Pending the report, the contracting parties agree not to increase their military or naval programs, unless danger from a third Power should compel such increase, in which case the other party shall be confidentially notified in writing, whereupon the latter shall also be released from its obligation to maintain its military and naval *status quo*. English text: *Springfield Republican*, August 8, 1913; *this Journal*, page 823; *Washington Post*, August 8, 1913; *Peace Movement*, 2:374; French text:

August, 1913.

Mouvement Pacifiste, 2:366; German text: *Friedens-Bewegung*, 2:385.

- 19 BALKAN WAR. International Commission appointed by the Carnegie Endowment for International Peace to investigate the atrocities of the Balkan War.
- 20 DEATH OF PROFESSOR LUDWIG VON BAR. Professor von Bar was born in 1836. Since 1863, except for a short time, he was professor of criminal law and international law at the University of Göttingen. He was a member of the *Institut de droit international*, having at one time been its president. He was a member of the Permanent Court of Arbitration at The Hague for Germany. He wrote a number of valuable books, the best known being: *Das internationale Privat-und Strafrecht*, 1862; *Theorie und Praxis des internationalen Privatrechts*, 1889; *Lehrbuch des internationalen Privat und Strafrechts*, 1892.
- 20-23. TWENTIETH UNIVERSAL PEACE CONGRESS met at The Hague.
- 25 FRANCE—GERMANY. It was announced that an agreement had been reached in regard to the control of the finances of the Bagdad Railway.
- 27 CHINA—GERMANY. German ship Emden fired upon by the Chinese rebels in the fort near Wuhu, returned the fire and silenced the fort. *Herald*, August 28, 1913.
- 28 THE PEACE PALACE AT THE HAGUE was formally opened. The money which built the Palace was given by Mr. Andrew Carnegie. *Ind.*, 75:280, 663; *R. of R.*, N. Y. 48:440.
- 29—September 20. EIGHTH INTERNATIONAL CONGRESS OF STUDENTS met at Buffalo, N. Y.
- 31 PANAMA CANAL. The last barrier in the Pacific end of the Panama Canal was blown away and the waters of the Pacific Ocean flowed into the canal as far as the Miraflores locks.

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- 1-23 GREAT BRITAIN—UNITED STATES. Arrangement effected by an exchange of notes, providing for extradition between the Philippine Islands or Guam and British North Borneo. *U. S. Treaty series*, No. 582.

September, 1913.

- 3-6 INTERPARLIAMENTARY UNION. The Eighteenth Annual Meeting of the Interparliamentary Union took place at The Hague. English text of resolutions passed in *Peace Movement*, 2:388; French text; *Mouvement Pacifiste*, 2:380; German text: *Friedens-Bewegung*, 2:401.
- 3 GREECE—TURKEY. Definite draft of the treaty between Greece and Turkey completed. *Times*, September 4, 1913.
- 9 SERVIA. Servia issued proclamation ratifying the treaty of Bucarest and declaring the new territories annexed to Servia. A second proclamation divides the territories into eleven departments. *Times*, September 9, 1913.
- 10 CHINA—JAPAN. The Japanese Government made demand upon China for reparation for the failure of China to protect the lives and property of Japanese subjects during the recent Chinese rebellion. Apologies from the central government and the local authorities concerned, indemnities for loss of life and property, and punishment for the officers who failed to protect the Japanese subjects are demanded and are considered by the Powers to be reasonable. China agreed to the demands, but the agreement to punish the officers was not carried out and a Japanese flotilla of torpedo boat destroyers was dispatched to Nanking on September 16. *Times*, September 12, 1913; *Herald*, September 13, 17, 1913; *Ind.*, 75:706.
- 10 FRANCE—HAITI. Agreement signed submitting to arbitration the claims of France against Haiti made in 1910, conjointly with the United States, Germany, Great Britain and Italy. The agreement covers the claims of Syrians and Ottomans, who are protégés of France in Haiti. The claims are against large banking houses in Haiti. The claims of the Syrians and Ottomans are based on a decree of the Haitian Government forbidding them to carry on commercial enterprises after May 31, 1912, except by license. French text: *J. O.*, 1913: 9251.
- 13 CHINA—GERMANY. It is reported that an agreement has been reached whereby China will employ a German Lieutenant General with a staff of six officers and an interpreter at Peking, and also 200 German officers who are to be distributed about the country. The cost of the scheme will be about \$1,000,000, of which it is said the Krupp Company—the German armament

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manufacturers—will provide \$250,000. Strong opposition on the part of the Powers is expected.

- 17 **BALKAN WAR. BULGARIA—TURKEY.** Official announcement made of the settlement of the frontiers of Bulgaria and Turkey in Thrace. The frontier starts at the mouth of the Maritza River and ends north of Midia on the Black Sea. Turkey retains Adrianople, Demotika and Kirk-Kilisseh, while Bulgaria retains Tirnovo, Mustapha, Pacha and Ortakoi. An agreement in principle has been reached on the subject of nationalities. One clause of the protocol is to the effect that the provisions of the Treaty of London not modified by the present protocol shall remain binding on both parties. The treaty gives Turkey about twice the territory awarded her under the Treaty of London. There still remains the difficulty in respect to the amount of indemnity payable by Turkey to Bulgaria for the maintenance of nearly 100,000 prisoners for about a year. The question is to be decided upon the interpretation of a phrase in the article of The Hague Convention which governs the subject. The Bulgarian delegates maintain that in the phrase "Le gouvernement au pouvoir duquel se trouvent les prisonniers de guerre est chargé de leur entretien" [Art. 7 of "Regulations respecting the laws and customs of war on land"] the words "est chargé" signify "is responsible for" and not "is chargeable for," as maintained by the Turkish delegates. The point may have to go to The Hague Tribunal for decision. *Herald*, September 18, 1913; *Times*, September 18, 19, 1913.
- 20 **GUATEMALA—UNITED STATES.** A treaty signed which was drawn upon the "Peace Plan" of the Secretary of State of the United States. See: August 7, 1913. **Salvador—United States.**
- 20 **PANAMA—UNITED STATES.** A treaty signed which was drawn upon the "Peace Plan" of the Secretary of State of the United States. See: August 7, 1913. **Salvador—United States.**
- 25 **BALKAN WAR.** Third campaign. Servia is reported to be remobilizing her troops, and to have had a number of engagements with Albanian troops.
- 26 **CHINA—RUSSIA.** It is announced that China has reopened negotiations with Russia in relation to the conclusion of a threefold

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treaty between China, Russia and Mongolia, providing for the recognition of the independence of United Mongolia under the rule of Kutuktu, or Khan, of Mongolia, subject to the suzerainty of China.

- 28 CHINA. Great Britain announced the dissolution of the Chinese loan agreement from which the United States withdrew its support some time ago. It was stated that the agreement had not worked to the satisfaction of the five Powers concerned,—Great Britain, Germany, France, Russia and Japan,—and that Great Britain took the initiative in withdrawing because of the failure of the other Powers to observe the spirit of the agreement. The five Powers will still act together in making loans to China for general administrative purposes, but each of the Powers has been left free to support any of its citizens in floating loans for railroads, or other industrial projects. The declared object of the original loan was to prevent an international scramble to loan money to China, but such a scramble is in progress.

☞ Insert at page 867 American Journal of International Law, Vol. 7, No. 4

INTERNATIONAL CONVENTIONS

ADHESIONS, RATIFICATIONS AND DENUNCIATIONS

Collisions at Sea. Brussels, September 23, 1910.

Ratifications:

Italy. *J. O.*, July 3, 1913.

Italy, for Erythria and Somali, *J. O.*, July 3, 1913.

Denmark. *J. O.*, July 13, 1913.

Great Britain for New Zealand. *Reichs-G.*, 1913, 331.

Portugal, July 25, 1913. *Monit.*, 1913, 5217.

Copyright. Literary and Artistic Property. Berne, 1886, Paris, 1896,
Berlin, 1908.

Ratifications:

Great Britain for the Isle of Man. *Dr. d'Auteur*, 21:105.

Netherlands for Surinam. *R. gén. de dr. int. pub.*, 20:543.

Industrial Property. Washington, June 2, 1911.

Adhesions:

Great Britain for New Zealand, Ceylon, Trinidad, Tobago.

R. gén. de dr. int. pub., 20:509.

French text: *Arch. dipl.*, 126:65.

International Law. Third International American Conference. Rio de Janeiro, August 23, 1906.

Signed by: Argentine Republic, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador. United States and Uruguay.

Ratifications:

Argentine Republic, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Panama, Salvador, United States, Uruguay.

Spanish, French and English texts: *U. S. Treaty series*, No. 565; English text: *U. S. Treaties and Conventions, 1910-1913*, 3:129.

Obscene Literature. Paris, May 4, 1910.

Adhesions:

Denmark for Danish Antilles. July 28, 1912. *Arch. dipl.*, 126:116.

Great Britain for all colonies and protectorates. *R. gén. de int. pub.*, 20:508.

French and English texts: *U. S. Treaty series*, No. 559.

Opium. The Hague, January 23, 1912.

Cuba. Decree carrying into effect the adhesion of Cuba to the International Opium Convention, with additional protocol.

Ga. Oficial (Cuba), May 10, 1913.

Postal Union. Rome, May 26, 1906.

Adhesions:

Argentine Republic, Bulgaria, Chile, Egypt, France and Algeria, Greece, India, Luxembourg, Mexico, Portugal and

Colonies, Roumania, Switzerland, Tunis, Turkey, Uruguay and Venezuela. *R. gén. de dr. int. pub.*, 20:544.

Public Hygiene. Rome, December 9, 1907.

Adhesions:

Argentine Republic, Belgium, Bolivia, Brazil, Bulgaria, Chile, Denmark, Egypt, France, Great Britain with Australia, Canada and India, Italy, Mexico, Monaco, Norway, Netherlands, Peru, Persia, Portugal, Russia, Servia, Sweden, Switzerland, Tunis, Turkey and United States. *R. gén. de int. pub.*, 20:505.

Radiotelegraph. London, July 5, 1912.

Signed by Germany and German Protectorates, the United States of America and the possessions of the United States of America, Argentine Republic, Austria-Hungary, Bosnia-Herzegovina, Belgium, the Belgian Congo, Brazil, Bulgaria, Chile, Denmark, Egypt, Spain and the Spanish Colonies, France and Algeria, French West Africa, French Equatorial Africa, Indo-China, Madagascar, Tunis, Great Britain and the British Colonies and Protectorates, the Union of South Africa, the Australian Federation, Canada, British India, New Zealand, Greece, Italy and Italian Colonies, Japan and Chosen, Formosa, Japanese Sakhalin and the leased territory of Kwangtung, Morocco, Norway, Netherlands, the Dutch East Indies and the Colony of Curaçao, Persia, Portugal and the Portuguese Colonies, Roumania, Russia and the Russian Possessions and Protectorates, Republic of San Marino, Siam, Sweden, Turkey and Uruguay.

Ratifications:

Belgium, and Belgian Congo.

Denmark.

Egypt.

Germany. July 5, 1913.

Great Britain. June 2, 1913.

Monaco.

Netherlands, Dutch East Indies, Curaçao. April 16, 1913.

Russia.

United States. February 5, 1913. Ratifications deposited

February 20, 1913. Proclaimed July 8, 1913.

English text: *G. B. Treaty series*, 1913, No. 10; English and French texts: *U. S. Treaty series*, No. 581; German text: *Reichs-G.*, 1913, 373; Dutch text: *Staats.*, 1913, No. 132.

Red Cross. Geneva, July 6, 1906.

Ratifications:

France. French decree promulgating Articles 23, 27 and 28.
French text: *J. O.*, 1913, 6722.

Salvage. Brussels, September 23, 1910.

Ratifications:

Italy. *J. O.*, July 3, 1913.

Italy for Erythria and Somali. *J. O.*, July 3, 1913.

Denmark. *J. O.*, July 13, 1913; *Monit.*, 1913, 4375.

Great Britain for New Zealand. *Reichs-G.*, 1913, 321.

Portugal. July 25, 1913. *Monit.*, 1913, 5217.

French text: *Arch. dipl.*, 126:26.

Sanitary Convention. March 19, 1897. Paris, December 3, 1903.

Denunciation:

Great Britain for South Africa. Dec. 10, 1912. *G. B. Treaty series*, 1913, No. 9.

Trademarks. Madrid, April 14, 1891.

An agreement modifying the arrangement of Madrid of April 14, 1891, was signed at Washington June 2, 1911, by Brazil, Cuba, Spain, France, Great Britain, Portugal, Switzerland and Tunis.

French decree promulgating agreement, April 17, 1913. French text: *Arch. dipl.*, 126:86.

Weights and Measures. Paris, May 20, 1875.

Accession:

Siam. April 24, 1912. *G. B. Treaty series*, 1913, No. 9.

White Slavery. Agreement, Paris, May 18, 1904.

Accession:

Mauritius, August 9, 1912. *G. B. Treaty series*, 1913, No. 9.

White Slavery. Convention. Paris, May 4, 1910.

Accession:

Netherlands for Dutch East Indies. May 5, 1913. *G. B.*

Treaty series, 1913, No. 9; Arch. dipl., 126:116.

KATHRYN SELLERS.

PUBLIC DOCUMENTS RELATING TO INTERNATIONAL LAW

GREAT BRITAIN¹

Aeronautics. Report of the Advisory Committee for Aeronautics. For 1912-13. (*Cd.* 6858.) 2½d.

Aliens Act, 1905. Bill to amend. *H. of C. Bills, 1913*, No. 142.

Brussels Sugar Convention. Correspondence respecting the withdrawal of H. M. Government from. (*Cd.* 6877.) 2½d.

China. Reports from H. M. Minister at Peking respecting the opium question in China. (*Cd.* 6876.) 3½d.

Congo. Further correspondence respecting the affairs of. January to April, 1913. (*Cd.* 6802.) 5½d.

Copyright. Order in Council, April 11, 1913, under Copyright Act, 1911, extending the Order in Council of June 24, 1912, regulating copyright relations with foreign countries of the Berne Copyright Union, to the Netherlands East Indies and the Colony of Curaçao. *Statutory Rules and Orders, 1913*, No. 482.

Copyright. Order in Council, June 13, 1913, extending the Order in Council of June 24, 1912, regulating copyright relations with foreign countries of the Berne Copyright Union, to the Colony of Surinam. *Statutory Rules and Orders, 1913*, No. 694.

Egypt. Despatch from H. M. Agent and Consul-General at Cairo transmitting the organic and electoral laws of Egypt, promulgated July 21, 1913. (*Cd.* 6875.) 4d.

Egypt. Reports of H. M. Agent and Consul-General on the finances, administration, and condition of Egypt and the Sudan in 1912. (*Cd.* 6682.) 9d.

Emigration and immigration. Tables relating to emigration and immigration from and into the United Kingdom in 1912, and report to the Board of Trade thereon. *H. of C. Reports and Papers, 1913*, No. 183. 8½d.

¹ Official publications of Great Britain and many of the British colonies may be purchased of Wyman & Sons, Ltd., Fetter Lane, E. C., London, England

England and Spain. Letters, despatches, and state papers relating to the negotiations between. Preserved in the archives at Vienna, Simancas, and elsewhere. Vol. IX. Edward VI. 1547-1549. 15s. 6d.

Liberia. Agreement between United Kingdom and Liberia, respecting the navigation of the Manoh River. Signed at Monrovia, April 10, 1913. *Treaty series, 1913*, No. 6. 1d.

International agreement for the prevention of false indications of origin on goods. Signed at Washington, June 2, 1911. *Treaty series, 1913*, No. 7. 1d.

International convention for the protection of industrial property. Signed at Washington, June 2, 1911. *Treaty series, 1913*, No. 8. 2½d.

International Radiotelegraph Convention. Signed at London, July 5, 1912. *Treaty series, 1913*, No. 10. 5½d.

Persia. Further correspondence respecting the affairs of Persia. March, 1912, to February, 1913. (*Cd. 6807.*) 3s. 1d.

Seal fisheries, Union of South Africa. Order in Council, May 7, 1913. *Statutory Rules and Orders, 1913*, No. 547.

State papers. Foreign series. Elizabeth. Vol. XVII. January-June, 1583, and addenda. 15s. 7d.

Subsidies. Report on bounties and subsidies in respect of shipbuilding, shipping and navigation in foreign countries. (*Cd. 6899.*) 6½d.

Treaties, etc., between the United Kingdom and foreign states. Accessions, withdrawals, etc. *Treaty series, 1913*, No. 9. 1½d.

Union of South Africa. Further correspondence relating to a bill to regulate immigration into the Union of South Africa, with special reference to Asiatics. (*Cd. 6940.*) 6½d.

UNITED STATES ²

Canal Zone. Executive order forbidding unauthorized use of flying-machines. August 7, 1913. 1 p. (No. 1810.) *State Dept.*

Indemnity. Report favoring bill to authorize payment of indemnity to Italian Government for killing of Angelo Albano. August 15, 1913. 2 p. (H. rp. 45.) *Foreign Affairs Committee.*

International Opium Conference. Communication accompanied by report of Hamilton Wright on behalf of American delegates to second

²When prices are given, the document in question may be obtained for the amount noted from the Superintendent of Documents, Government Printing Office, Washington, D. C.

International Opium Conference, which met at The Hague July 1, 1913 and adjourned July 9, 1913. August 9, 1913. 89 p. (S. doc. 157.) *State Dept.*

Italy. Treaty between United States and Italy, amending Article 3 of treaty of commerce and navigation of February 26, 1871; signed at Washington, February 25, 1913, proclaimed July 3, 1913. 5 p. (Treaty series 580.) [English and Italian.] *State Dept.*

Mexican affairs. Address delivered at joint session of two houses of Congress by President of United States, August 27, 1913, with reply of Señor Gamboa to proposals of American Government conveyed through John Lind. 14 p. Paper, 5c.

_____. Same. (H. doc. 205.)

Mexico. Report, in response to resolution, relative to claims for damages to person or property made by citizens of United States against Republic of Mexico. July 30, 1913. 2 p. (S. doc. 148.) *State Dept.*

Mexico. Statement of conditions in Republic of Mexico with relation to Diaz and Madero régime and Huerta de facto government. August 6, 1913. 14 p. (S. doc. 153.) Paper, 5c.

Monroe Doctrine. Article on Monroe Doctrine, published in Chicago Legal News, by Darius H. Pingrey. July 23, 1913. 11 p. (S. doc. 138.) Paper, 5c.

Opium. Report amending bill regulating manufacture of smoking opium within United States. June 23, 1913. 2 p. (H. rp. 22.) *Ways and Means Committee.*

_____. Report favoring bill for registration of, with collectors of internal revenue, and to impose special tax upon persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations. June 24, 1913. 4 p. (H. rp. 23.) *Ways and Means Committee.*

_____. Report amending bill to amend act to prohibit importation and use of opium for other than medicinal purposes. June 24, 1913. 5 p. (H. rp. 24.) Paper, 5c.

Peace. World peace, sermon on world peace under American leadership, by T. M. C. Birmingham. July 23, 1913. 18 p. (S. doc. 139.) Paper, 5c.

Seal and seal fisheries. Preservation and protection of fur seals and sea otter, proclamation. May 31, 1913. 2 p. (No. 1246.) *State Dept.*

GEO. A. FINCH.

JUDICIAL DECISIONS INVOLVING QUESTIONS OF INTERNATIONAL LAW

AMERICAN AND BRITISH CLAIMS ARBITRATION

[Arbitrators: M. Henri Fromageot, Sir Charles Fitzpatrick and Honorable Chandler P. Anderson.]

Award of the Tribunal in the Matter of the Lindisfarne. Claim No. 1

Decision rendered June 18, 1913

On the 23d of May, 1900, the United States Army Transport *Crook*, damaged by collision the British steamship *Lindisfarne*, net tonnage 1944 t. in the harbor of New York. The *Lindisfarne* had to be repaired and the time while the repairs were being carried out was one day. The cost of these repairs was defrayed by the United States Government, and His Britannic Majesty's Government, on behalf of the owners of the said ship, claim a sum of £32/8/0 for the one day's demurrage, with interest at 4% for eleven years, i. e., from the 25th of May, 1901, the date on which His Britannic Majesty's Government first brought the claim to the notice of the officials of the United States Government, to the 26th of April, 1912, the date of the confirmation of the first schedule to the Pecuniary Claims Convention, viz., £14/5/1, making a total of £46/13/1.

The Government of the United States denies that it is liable for demurrage on account of the injury sustained by the *Lindisfarne* through such collision, and asks that this claim be dismissed and finally barred.

The facts as to the collision are set forth in a communication of the Secretary of State for the United States, dated January 2, 1902, the text of which is quoted in the British memorial. These facts are admitted by the United States Government in their answer and are as follows:

The *Crook* was being backed out of Pier No. 22 and was under charge of the Cahill Towing Company, contractors for handling the army transports in New York Harbor; that while being backed, another vessel crossed her stern, and Assistant Marine Superintendent Lothrop, who was on the *Crook*, seeing danger of colliding with it, gave orders to stop the *Crook* which caused her bow to swing against the *Lindisfarne* lying alongside, with such force as to damage her.

Further it appears from the documents of the case (letter of the Secretary of State, January 8, 1902), that on the day after the collision, *i. e.*, on May 24th noon to noon May 25, 1900, the necessary repairs to the *Lindisfarne* were made by order of the army transport officials, and after having been made the cost of these repairs was defrayed by an appropriation for that purpose by an Act of Congress approved April 7, 1906.

On May 26, 1901, the shipowners acting through their agents in New York, Messrs. J. H. Winchester and Company, wrote to the General Superintendent, Army Transport Service, claiming for the one day's demurrage of the ship while undergoing repairs.

On September 3, 1901, the United States military authorities in New York answered that the claim could not legally be paid in the absence of a specific appropriation therefor. It was added that the claimant should apply to Congress wherein appropriations were made for like purposes.

On November 4, 1901, December 10, 1904, and February 27, 1906, the British Government, through their Ambassador at Washington, presented to the Department of State of the United States notes relative to the claim, requesting that the said claim be submitted to Congress.

On January 13, 1902, December 14, 1904, March 14, 1906, and January 6, 1909, the claim was presented to Congress, either with the expression of opinion of the War Department that "*the claim for demurrage is warranted*" or with the statement of the Department of State "*that in view of the recognition given*" this claim "*by one or another of the Departments it is not easy for this Department to give satisfactory reasons why provision for the payment is not made.*" Favorable reports on this claim were made by the Senate Committee of Foreign Relations, and by the House of Representatives' Committee on Claims. Notwithstanding the pressing notes of the British Embassy at Washington and notwithstanding all these favorable reports, expressions of opinion and recommendations, no conclusive action was taken by Congress.

Under these circumstances the British Government contend that the liability of the United States Government has never been contested, and the failure by Congress to make an appropriation to pay is the only cause of non-payment.

On the other hand, before this Tribunal, the United States Government raises various reasons tending to reject any liability: First, that the collision was caused through the efforts of the *Crook* to avoid running

down a third vessel, and these efforts were conducted with ordinary care and maritime skill; second, that the collision was not the result of any negligence on the part of the officer in command of the *Crook*, either in the determination of a course of action or in the handling of the transport, and no negligence on his part can be presumed in view of his manifest duty to avoid colliding with a vessel in motion; third, that the collision was in fact and in law an inevitable accident; and fourth, that no evidence is presented on behalf of His Britannic Majesty's Government upon which a claim for demurrage can be predicated or the amount of demurrage computed; and fifth, that the Government of the United States has never admitted any liability for the collision.

Such are the facts of the case and the contentions of the two parties.

I. As to the liability:

The United States Government does not deny that it must assume the liability, if any, incurred by the *Crook*.

It is not contested that the collision took place between the *Crook*, which was under way, and the *Lindisfarne* which was lying in dock.

It is a universally admitted rule of maritime law, as well in the United States as elsewhere, that in case of collision between a ship under way and a ship at anchor, it rests with the ship under way to prove that she was not at fault, or that the other ship is at fault.

In the present case no sufficient evidence is afforded in that respect by the United States Government. The mere fact that a third vessel crossed the *Crook's* stern, while she was being backed, and that there was danger of colliding with a third vessel is not sufficient evidence that the collision with the *Lindisfarne* was an inevitable accident. The mere fact that the *Crook* stopped to avoid collision with a third vessel is not sufficient evidence that the *Crook* did use the necessary care and maritime skill. No evidence is presented either as to the speed, handling, and way of the third vessel, or as to the speed of the *Crook*, the lookout on board that ship, the time when the order to stop was given, or as to the hour of the collision, the weather at that time, the tide, currents, and general condition of the waters in the harbor of New York at that time, or as to the harbor's regulations and the due observance of those regulations. No evidence and no contention is presented involving any breach of duty, or any liability on the part of the *Lindisfarne*.

The United States Government contends that some of the state or Congressional papers refer to certain reports (with the text of which

the parties have been unable to provide the Tribunal), expressing the opinion that the collision was an accident which could not be foreseen. But it is stated in certain other reports, which have not been furnished to the Tribunal but which are quoted in other state or Congressional papers printed in the memorial, that the fault was entirely that of the *Crook*.

The United States Government contends that it did not admit liability for the collision by the Act of Congress approved April 7, 1906, and entitled "*An Act providing for the payment to the New York Marine Repair Company of Brooklyn, New York, of the cost of the repairs to the steamship Lindisfarne necessitated by injuries received from being fouled by the United States Army Transport 'Crook,' in May, 1900.*" They maintain that the defraying of these repairs was simply a matter of grace and an unusual liberality. But no evidence is presented showing an intention to do an unusual liberality. Nothing appears in that respect in any of the Congressional papers and documents. On the contrary the same papers show clearly that the said payment was provided for by Congress on an assumption of an obligation to pay, arising out of a liability.

Under these circumstances the Tribunal is of the opinion that there is no good reason to reject the liability of the United States Government.

II. As to the nature and amount of the claim:

The British Government claim for the one day's demurrage while the *Lindisfarne* was repaired.

It is clear that demurrage means some detention or delaying of the ship during a certain time.

In that respect no sufficient evidence is afforded by the British Government that the repairs have delayed or interrupted in any way the commercial operations of the *Lindisfarne*.

But according to clause No. 2 of Terms of Submission annexed to the *compromis*, it has been specially agreed by the two governments:

The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim any admission of liability by the government against whom a claim is put forward.

It has already been shown that on the many occasions when this claim was under consideration neither the United States authorities nor government objected to the claim for demurrage.

Under these circumstances the Tribunal, acting under the said specially stipulated terms of submission, consider it just not to disallow this claim.

III. As to interest:

The claim was presented first on May 25, 1901, to the army authorities of the United States, and they then explained that it should not be addressed to them but to the United States Congress. It was then presented to Congress through the Department of State, acting at the request of the British Ambassador on January 8, 1902. Since that time there is no evidence to justify why during more than ten years the bills, however favorably presented, reported and recommended, never passed. As the Secretary of State said himself in his letter of March 23, 1906, in view of the recognition given these claims by one or another of the Departments *it is not easy to give satisfactory reasons why provision for the payment has not been made.*

Without referring to other grounds and discussing the United States contention that according to their public law no interest is due on state debts, the Tribunal is authorized by clause No. 4 of the Terms of Submission, annexed to Schedule I of the *compromis*, to allow interest at 4% per annum for the whole or any part of the period between the date when the claim was first brought to the notice of the other party. Taking into consideration the circumstances above mentioned, the Tribunal thinks it is equitable to do so in the present case.

On these motives,

The Tribunal decides that the United States Government shall have to pay the British Government the sum of £32/8/0 with interest at 4% since the 8th day of January, 1902, to the 26th day of April, 1912.

The President of the Tribunal,

HENRI FROMAGEOT.

Ottawa, June 18, 1913.

Award of the Tribunal in the Matter of William Hardman. Claim No. 2

Decision rendered June 18, 1913

On or about July 12, 1898, during the war between the United States and Spain, while the town of Siboney, in Cuba, was occupied by the United States armed forces, certain houses were set on fire and de-

stroyed by the military authorities in consequence of sickness among the troops and from fear of an outbreak of yellow fever. In one of these houses was some furniture and personal property belonging to a certain William Hardman, a British subject, which was entirely destroyed with the house itself.

The British Government claim, on behalf of the said William Hardman, the sum of £93 as the value of the said personal property and furniture, together with interest at 4 per cent. for thirteen years from March, 1899, when the claim was brought to the notice of the United States military authorities in Cuba, to the 26th of April, 1912, when the schedule to the Pecuniary Claims Agreement, in which the claim was included, was confirmed, *i. e.*, £49—the full claim being, therefore, for the total sum of £142.

The United States denies that it is liable in damages for the destruction of the personal property of William Hardman, and contends that the United States military authorities who were conducting an active campaign in Cuba, had a right, in time of war, to destroy private property for the preservation of the health of the army of invasion and that such authorized destruction constituted an act of military necessity or an act of war, and did not give rise to any legal obligation to make compensation.

The two parties admit the facts as above related and agree as to those facts. The British Government do not contend that Hardman's nationality entitled him to any special consideration. At the hearing of the case they did not maintain their former contention that there is no sufficient evidence of the same interest to destroy the furniture as the house. They admit that necessary war losses do not give rise to a legal right of compensation. But they contend that the destruction of Hardman's property was not a war loss in that it did not constitute a necessity of war, but a measure for better securing the comfort and health of the United States troops, and that in that respect no private property can be destroyed without compensation.

The question to be decided, therefore, is not whether generally speaking the United States military authorities had a right, in time of war, to destroy private property for the preservation of the health of the army, but specially whether under the circumstances above related, the destruction of the said personal property was or was not a necessity of war, and an act of war.

It is shown by an affidavit of Brigadier General George H. Torney,

Surgeon General, United States Army (United States answer, Exhibit 3), who personally was present at that time at Siboney and familiar with the sanitary conditions then existing in that place, that the sanitary conditions at Siboney were such as made it advisable and necessary to destroy by fire all buildings and their contents which might contain the germs of yellow fever. No contrary evidence is presented against this statement, the truth of which is not questioned.

In law, an act of war is an act of defense or attack against the enemy and a necessity of war is an act which is made necessary by the defense or attack and assumes the character of *vis major*.

In the present case, the necessity of war was the occupation of Siboney, and that occupation which is not criticized in any way by the British Government, involved the necessity, according to the medical authorities above referred to, of taking the said sanitary measures, *i. e.*, the destruction of the houses and their contents.

In other words, the presence of the United States troops at Siboney was a necessity of war and the destruction required for their safety was consequently a necessity of war.

In the opinion of this Tribunal, therefore, the destruction of Hardman's personal property was a necessity of war, and, according to the principle accepted by the two governments, it does not give rise to a legal right of compensation.

On the other hand, notwithstanding the principle generally recognized in international law that necessary acts of war do not imply the belligerent's legal obligation to compensate, there is, nevertheless, a certain humanitarian conduct generally followed by nations to compensate the private war losses as a matter purely of grace and favor, when in their own judgment they feel able to do so, and when the sufferer appears to be specially worthy of interest. Although there is no legal obligation to act in that way, there may be a moral duty which can not be covered by law, because it is grounded only on an inmost sense of human assistance, and because its fulfilment depends on the economical and political condition of the nation, each nation being its own judge in that respect. In this connection the Tribunal can not refrain from pointing out the various benevolent appreciations given by the Department of State in this particular case, and commends them to the favorable consideration of the Government of the United States as a basis for any friendly measure which the special condition of the sufferer may justify.

Upon these motives,

The decision of the Tribunal in this case is that the claim of the British Government be disallowed.

Ottawa, June 18, 1913.

The President of the Tribunal,

HENRI FROMAGEOT.

Award of the Tribunal in the Matter of the King Robert. Claim No. 4

Decision rendered June 18, 1913

This is a claim on behalf of the Glasgow King Shipping Company (Limited) for the sum of £111 3s. 8d. with interest at 4 per cent. per annum from the 10th of April, 1906, to the 26th of April, 1912, amounting to £26 13s. 8d. making a total of £137 17s. 4 d. Of this amount £100 13s. 8d. represents interest at the rate of 6 per cent. per annum from the 17th of November, 1905, to the 7th of March, 1906, on the sum of \$26,486.40, freight earned by the *King Robert* while chartered as below set forth and £10 10s. represents the expenses of cables, telegrams, postage, etc., in relation to this claim for interest.

The *King Robert* was employed under an agreement dated June 8, 1905, which is set forth in Annex 7 of the British memorial, by which the Glasgow King Shipping Company, owners of the *King Robert*, and Messrs. R. Chapman & Son, of Newcastle-on-Tyne, agreed that in consideration of the said steamer "being nominated by R. Chapman & Son under their Contract with the U. S. Bureau of Equipment, Navy Department, Washington, D. C., dated the 11th February, 1905, for the transportation of Coal from Norfolk, Newport News, Philadelphia, or Baltimore to Manila, the Owners agree to relieve R. Chapman & Son from all responsibility for and in relation to the transportation of a Cargo of not less than 5,400 tons, or more than 5,700 tons, from Norfolk, Newport News, Philadelphia, or Baltimore, as ordered, to U. S. Naval Coal Depot, Sangley Point, Manila Bay, under the terms of said Contract, copy of which is attached." It was further specified that freight at \$4.80 per ton was to be collected.

The document described in this agreement as R. Chapman & Son's "Contract with the U. S. Bureau of Equipment, Navy Department, Washington, D. C., dated the 11th February, 1905," a copy of which is referred to as attached to that agreement, is set forth in Annex 7 of

the British memorial. The copy of this document which was annexed to the agreement has also been produced for the inspection of this Tribunal.

This document shows on its face that it is not a contract between R. Chapman & Son with the U. S. Bureau of Equipment, Navy Department, as described in R. Chapman & Son's agreement of June 8th with the Glasgow King Shipping Company. The opening paragraph shows conclusively that the U. S. Bureau of Equipment is not a party to it, the parties being described as Messrs. McCall & Co., by cable authority of Messrs. Wrenn & Co., London agents for Messrs. R. Chapman & Son, Steamship Owners of Newcastle-on-Tyne; and Messrs. McCall & Co., contractors to the U. S. Bureau of Equipment, Navy Department, Washington, D. C. It is true that at the close of this document the following paragraph appears:

As agents, by authority of Messrs. Wrenn and Co., London, dated February 9th, 10th and 11th, agents for Messrs. R. Chapman and Son, Newcastle, and H. N. Manney, Chief Bureau of Equipment, Navy Department, Washington, D. C.

So far, however, as this purports to be a representation that McCall & Co. are agents for H. N. Manney, Chief Bureau of Equipment, Navy Department, it is valueless because McCall & Co.'s signature is not affixed to the document. Moreover, no authority has been shown, and so far as appears there is no justification for any such representation of agency on the part of McCall & Co.

This so-called contract may have been a preliminary memorandum, but at any rate it fails utterly to imply any contracted relation between Messrs. Chapman & Son and the United States Bureau of Equipment of the Navy Department.

In the answer of the United States a signed contract is set forth (Exhibit 2), dated the 8th of March, 1905, between "Messrs. McCall & Co., of Baltimore, Md., in the State of Maryland, party of the first part, and the United States, by the Purchasing Pay Officer, United States Navy Pay Office, Baltimore, Md., acting under the direction of the Secretary of the Navy, party of the second part." By this contract McCall & Co. agreed to furnish "Transportation of 30,000 tons (10 % more or less) best quality bituminous coal from Baltimore, Md., Philadelphia, Pa., Lambert's Point, Va., or Newport News, Va. (loading port for each cargo at the option of the Bureau of Equipment) to the U. S. Naval Coal Depot, Sangley Point, Manila Bay, Philippine Islands.

Rate of freight four dollars eighty-seven and one-half cents (\$4.87½) per ton 2240 lbs."

There is no sufficient evidence of any other contract with the Government of the United States, and it appears on the contrary that it is under this contract that the United States Government paid to the McCall-Dinning Company (the successors of McCall & Co.) \$26,811.75 on the 6th of March, 1906, freight for 5,506 tons delivered on the 17th of November, 1905 (United States answer, Exhibit 1). It will be observed that this payment was for freight at the rate of \$4.87½ per ton as provided in this contract, and not at the rate of \$4.80 per ton as provided in the so-called contract above mentioned of February 11, 1905, a copy of which was annexed to and formed part of the charter party of June 8, 1906, between the owners of the *King Robert* and Chapman & Co., at which lower rate the freight would have amounted to only \$26,428.80, being \$382.55 less than the amount which the McCall-Dinning Company have accounted for to the owners of the *King Robert* for this service.

It is unquestioned that the transportation by the *King Robert* of the cargo delivered in November, 1905, and paid for by the United States Government as above set forth is the same transportation as that upon which this claim is founded (Walker & Co.'s bill of March 30, 1906, British memorial, Annex 1).

The Tribunal, therefore, must rely only on this contract of March 8, 1905, between McCall & Co. and the United States in determining the liability of the United States in this case, and consequently the Tribunal finds that there was no privity of contract between the United States Government and the owners of the *King Robert* who were merely contractors with a sub-contractor of McCall & Co., who in turn were merely contractors with the United States Government, and not agents for that government.

The contract of March 8, 1905, between McCall & Co. and the United States Government expressly provides:

That upon the presentation of the customary bills, and the proper evidence of the delivery, inspection, and acceptance of the said article, articles, or services, and within ten days after the warrant shall have been passed by the Secretary of the Treasury, there shall be paid to the said McCall & Co., or to their order, by the navy paymaster for the port of Philadelphia, Pa., the sum of one hundred and forty-six thousand two hundred and fifty dollars, for all the articles delivered or services performed under this contract: *Provided, however,* That no payments shall be made

until all the articles or services shall have been delivered or performed and accepted, except at the option of the Bureau of Supplies and Accounts.

It is mutually understood and agreed, as aforesaid, that no payment or allowance to said party of the first part will or shall be made by the United States for or on account of this contract except as herein specified.

There is nothing in this case to show that the payments thus provided for have not been made by the United States in exact accordance with these requirements of that contract.

The Tribunal is therefore of the opinion that the owners of the *King Robert* are not entitled to recover interest against the United States Government for delaying until March 6, 1906, before paying to Messrs. McCall & Co. the freight earned by the *King Robert*, and as the other items of the claim are dependent upon this item, they fall with it.

Upon these motives,

The decision of the Tribunal in this case is that the claim of the British Government be disallowed.

The President of the Tribunal,

Ottawa, June 18, 1913.

HENRI FROMAGEOT.

Award of the Tribunal in the Matter of Yukon Lumber. Claim No. 5

Decision rendered June 18, 1913

At the end of September, 1900, the Dominion Crown Timber and Land Agent at Dawson, Yukon Territory (Canada), Mr. F. X. Gosselin, was aware that a certain quantity of timber, viz., 68,500 feet, had just been cut without permit or authority on the vacant Dominion lands by a certain Howard Mountain, and that the said Mountain had sold the same timber to a certain O. N. Ramsay, who at that time was a contractor for the United States military authorities in Alaska, that the said Ramsay, under a contract of sale for delivery, had delivered the same with other large quantities of timber to the said United States military authorities, and also that the said Ramsay, who had obtained, at the request of the United States military authorities, a permit for 50,000 feet, had cut in trespass 24,570 feet more, and delivered the same to the said authorities.

It appears from a letter from the said Crown Agent, Gosselin, that he met Ramsay and Mountain at that time, but did not claim for recovery

of the timber illegally cut and claimed only for payment of the Crown dues at \$4 per M. on the said timber as if it had been legally cut.

It is shown (Gosselin's letters December 4, 1900, and July 20, 1901) that, on September 29, 1900, Ramsay paid the Crown dues for the 24,570 feet of timber cut by him in excess of his permit, *i. e.*, in trespass, and that Gosselin then took Mountain's promise that he would pay the same Crown dues for the 68,500 feet also cut in trespass *when he would come to Dawson some time during the winter* (Gosselin's letter December 4, 1900) or *as soon as he had cashed the order from Mr. Ramsay* which he had received for logs (Gosselin's letter July 20, 1901); and that delay was agreed to.

On December 4, 1900, Gosselin informed the Department of the Interior of the above mentioned facts and on January 17, 1901, the Secretary of that Department, without objecting to anything Gosselin had done, gave an instruction that *if the dues are not paid within a reasonable time*, the matter is to be reported to the officer commanding the Department of North Alaska for advice as to what steps should be taken to recover the amount of dues and expenses, but no reference is made to any claim to the timber or its value.

In the meantime, that is to say on November 15, 1900, January 4, 10, 12 and March 2, 1901, the United States military authorities paid Ramsay for all the timber (300,000 feet) he had sold and delivered under contract.

In May or June, 1901, Gosselin was informed that Mountain had gone away to San Francisco, leaving no property behind him, and that he departed under an assumed name owing several people in the country.

On July 20, 1901, the said Crown Agent Gosselin, applied to the United States military authorities for payment of the Crown dues left unpaid by Mountain for the timber sold by him to Ramsay and by Ramsay to the said authorities. The Crown Agent observed that Ramsay had a permit granted to him as a consideration to the United States Government, and that he should have ascertained whether or not Mountain, his vendor, had paid the Crown dues.

The views officially expressed by the Government Legal Adviser in Alaska (British memorial, Annex 16) were that it would be the duty of the United States Government to either pay the dues on the 68,500 feet cut by Mountain or to see that Ramsay did.

Thereafter a correspondence was exchanged during the year 1902 between the Canadian Government and the United States military

authorities in Alaska and Washington, wherein on one side the views of the Canadian Legal Adviser were communicated and applications were made to obtain from the military authorities the payment of the dues which Mountain failed to pay, and on the other side, the United States military authorities replied that they were not to be held responsible for the dues which Mountain had not paid.

Since 1902 no documents appear in the memorial except two affidavits given apparently for the present case, one of them dated in 1912, and the other without any year mentioned.

The British Government claim at the present time before this Tribunal that the United States Government should either pay the timber dues in question or the value of the timber converted by the Government of the United States to their own use.

The United States Government, on the other hand, contends that the claim is not well founded in fact or in law, and asks that it be dismissed and finally barred.

It is clear at the outset that a double trespass was committed in September, 1900; one by Ramsay who cut 24,570 feet without permit, and the other by Mountain who cut 68,500 feet without permit.

In such matters the Canadian Government is represented by the Crown Agent whose duties and powers are defined in an Order in Council of July 7, 1898, Article 6 (British memorial, Annex 27) in the following terms:

It shall be the duty of the Crown Timber and Land Agent, subject to the authority of the Commissioner, *to receive and regulate all applications for licenses and permits to cut timber for lumbering purposes and for fuel, for the purchase of coal lands, for the lease of lands for grazing purposes and for hay permits; also subject to regulations to be provided in that behalf, to receive and deal with applications for the purchase of land, but no lease or sale of land shall take place except in accordance with the regulations furnished from the Department.*

The Crown Agent dealt with Ramsay and Mountain in the same manner, when he was informed of the trespass; he neither reproached the trespassers for their offence, nor did he claim the timber or its value, about \$34.40 per M. (United States answer, Exhibit 5), but he claimed only the Crown dues of \$4 per M.

The Crown Agent did not, and since that time the Canadian Government did not, claim that the ownership of the timber rested in the Crown; the Canadian Government has considered itself not as the owner of the timber, nor even as the creditor of its value, but only as

the creditor of certain dues, called Crown or stumpage dues, of \$4 per M., and it is shown that the Crown Agent, after having been paid by the first offender, Ramsay, granted Mountain delay until some time during the winter of 1901. Such a concession of delay implies, in this Tribunal's opinion, the existence of a debt, and not of a claim for repossession.

Not only has this been the attitude of the Crown Agent and the Canadian Government with both Ramsay and Mountain, but also with the United States military authorities.

From the very beginning, that is to say, from September and December, 1900, the Canadian Government and its agents were perfectly aware that the timber was in the possession of the United States military authorities, but they never claimed for it or for its value. According to the express statement of the Secretary of the Interior (letter December 9, 1901), it was only when *the Agent* of that Department at Dawson did not succeed in collecting the dues from Mountain and Ramsay, that application was made to the United States authorities to pay the said dues.

Under these circumstances, Mountain sold to Ramsay, and Ramsay sold to the United States military authorities not a thing belonging to a third person but a thing liable for certain dues remaining unpaid; that is to say, the United States military authorities, whose perfect good faith has never been questioned, did not receive from Ramsay some timber, the title to which was still vested in the Canadian Government, but some timber for which Mountain, the original vendor, had not paid the dues.

So the question which arose between the two parties has never been whether or not the ownership in the timber rested in the United States military authorities, but whether those authorities had or had not to pay the dues instead of the vendor of their vendor.

Even now, before this Tribunal, the British Government claim for payment of dues, and they have added only as an alternative a claim for the value of the timber. The opinion of this Tribunal is that it is impossible to admit that after having at the beginning ratified the trespass and claimed during thirteen years for only the payment of dues, and still now claiming for that payment, the British Government is entitled to contend that they retained the ownership of the said timber and claim for its value as representing the thing itself which has been consumed. Moreover the British Government does not claim first for

the value, and secondly for the dues, but first for the dues, and in the alternative for the value. It seems that this alternative is somewhat contradictory, as it is clear that the claim for the dues is exclusive of a claim for recovery.

Consequently the question to be decided is not whether or not the United States military authorities are the legal owners of the timber but whether or not the debt of the Crown dues can be claimed against them, which is quite a different question and the only one to be considered.

In the first place, it is difficult to find any personal obligation of the United States military authorities towards the Canadian Government. The said authorities have made no contract, and have committed no negligence, out of which could arise an obligation. Even supposing that Ramsay's permit had been granted at their request, and that they had some liability as to Ramsay's trespass, they had absolutely nothing to do with Mountain. It is impossible to find in the promise that Ramsay would not in any way abuse the permission given him to cut logs, a caution or a guarantee or some other obligation personally assumed as to the payment of Crown dues by a third person from whom Ramsay may have purchased some timber which was sold *afterwards* to the said military authorities.

The United States military authorities have purchased from Ramsay, and paid him for the timber in perfect good faith, they had no notice of its origin, they did not assume in any way the debts and engagements which the original provider of their vendor may have assumed towards the Canadian Government in respect of the cutting of the timber; they cannot be held bound and obliged by Mountain's promise made to and agreed to by the Crown Agent to pay the dues at such or such a time, *i. e.*, some time during the winter of 1901.

In the second place the United States military authorities are not bound *in rem*.

It is not contested that the cutting of timber in the Yukon Territory is subject to the Canadian regulations which have full power to provide the Canadian Government with such lien or other securities for guaranteeing the payment of their dues, as well as with the right of legal prosecution against any offender. The right of legal prosecution has not been exercised, and the Canadian Government has never claimed except for the dues.

Even supposing that Canadian legislation reserved a lien on the tim-

ber, giving the Crown a title to seize the timber in order to be paid the dues, this lien is inoperative in the present case.

First, because the timber is outside the Canadian territory, and the lien, if any, enacted by the municipal law cannot be enforced in a foreign country against a foreigner unless such a lien is provided for by the law of that country, and can be enforced under that law.

Second, because the timber having become state property is not subject to any seizure.

Finally, the Canadian Government does not seem justified in complaining now of a grievance which easily could have been avoided.

The still wild condition of the country may explain the absence of any efficient control over timber cutting, taking out, and passing the boundary; but the Canadian Government had every opportunity and facility in September, 1900, and at least from November, 1900, to March, 1901, until the final payment for the timber, to claim for the recovery of the timber, or of its value, to stop the payment of the sums representing that value, when they were in the hands of the United States military authorities.

Under these conditions, the cutting of timber as well by Mountain as by Ramsay having been ratified by the Canadian Government, it remained only a debt of Crown dues. Ramsay's debt was paid by Ramsay himself, and Mountain's debt cannot be considered as constituting for the United States military authorities either a personal obligation or an obligation *in rem*. Furthermore the Canadian Government, having been able to avoid the grievance arising from Mountain's acts, does not seem to be entitled now to hold the United States military authorities in any way responsible for it.

On these motives,

The decision of the Tribunal is that the claim of the British Government be disallowed.

The President of the Tribunal,

HENRI FROMAGEOT.

Ottawa, June 18, 1913.

AMERICAN EXPRESS COMPANY ET AL. v. UNITED STATES

B. BERTUCH & CO. ET AL. v. UNITED STATES

United States Court of Customs Appeals

December term, 1912

MONTGOMERY, Presiding Judge, delivered the opinion of the court:

These cases involve the importations of chemical wood pulp and sulphide wood pulp from Norway, Russia, Austria-Hungary, and Germany. Free importation was claimed on the ground that by virtue of the favored-nation clause in subsisting treaties between the United States and the various exporting countries, when construed in connection with section 2 of the Act of July 26, 1911, entitled "An Act to promote reciprocal trade relations with the Dominion of Canada and for other purposes," free importation was provided for.

The goods were assessed for duty under paragraphs 406 and 409 of the Tariff Act of 1909. The board overruled the protest, and the importers have appealed to this court.

Many of the questions discussed in the brief of the importers' counsel have been eliminated by concessions made by the Assistant Attorney General in his brief and on argument. It was argued before the board—and the argument found some favor—that Canada was not a nation within the meaning of the favored-nation clause. But it is now assumed by counsel for the government that Canada is an autonomy with which a treaty was made, and that the court will not pause to inquire as to the municipal government of such autonomy. It is assumed that it is, a nation for treaty purposes, and this may well be assumed, as this government has itself so treated it.

It is also conceded, for the purposes of this case, that the treaties in question, while employing different language, in some of which the language may be construed as being contractual only, and in others taking the form of positive assurance, no distinction on that account should be made between the several countries represented by the protest, and that for the purposes of this litigation it is admitted that the position of each of these nations is equal to the one having the most advantageous treaty.

It is also conceded that section 2 of the Act of 1911 is operative, notwithstanding the fact that Canada refused to avail itself of the option

to establish reciprocity as to any other importations as provided for in other sections of the Act.

The case would seem, therefore, to be narrowed down to three questions, the first of which is whether the court may enforce treaty provisions in this form of action, *i. e.*, whether the treaty is a part of the municipal law, binding upon the courts, or whether the enforcement and observance of treaties is in all cases a political question to be left to other departments of government; secondly, whether the treaty in question is, as it relates to the goods imported from a contracting nation, a self-executing provision; and thirdly, if both of these questions are answered in the affirmative whether the provisions of section 2 of the act of July 26, 1911, were adopted upon a consideration moving from Canada to the United States, for admittedly if this agreement admitting to free entry the importations from Canada of wood pulp and paper was upon a special consideration passing from the Canadian Government to the United States, such treaty would constitute no infraction of the favored-nation clause here in controversy.

We summarize the contentions of counsel for the government upon the first point by quoting from the government's brief:

In short, to say that our contracts with foreign countries have been kept or fulfilled is a legislative or executive office, not a judicial one. It follows that if a treaty is promissory it is not part of the supreme law. * * *

It has been said numberless times in this and similar cases that favored-nation clauses are "self-executing if the concession granted is voluntary."

But what power decided whether it was intended to receive a consideration for a favor granted?

And after a discussion of the subject it is further stated:

In effect, then, whether a treaty is self-executing or only executory is not a question for the courts; its status is wholly political and for the political department to settle, and whether an act of Congress derogates from a treaty is not a judicial question. The proper political department upon complaint made is charged with the duty of deciding and adjusting the whole matter. As a political question, it makes no difference when representations are made to the State Department whether the treaty claimed to have been violated by us was the one sort or the other. To say our courts had held it not to be violated would hardly be accepted by an aggrieved foreign nation as conclusive of the subject; but, on the contrary, our whole foreign policy would depend upon an adjustment honorable to both parties, no matter what our courts might have said; and with wisdom born of the consciousness of this fact the courts have held it not to be a judicial question.

There is no question that jurisdiction exists in the Board of General Appraisers and on appeal in this court to determine the rate and amount of duty, if any, to be imposed upon all merchandise imported into the ports of this country. This jurisdiction is subject to no restriction whatever unless the contention of the government's counsel should be accepted, and unless it should be held that when the law which is invoked consists of a treaty the question presented is no longer a judicial question.

Article VI of the Constitution provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land: * * *

Unquestionably the duty imposed upon this court of determining the force and effect of the treaty here in question is a delicate one. If, however, a treaty is binding as a law of the land, it would seem to be the duty of any tribunal whose functions consist of construing and applying the law whenever the conditions arise which make such treaty applicable to declare its force and effect. As was said by Chief Justice Marshall in *Marbury v. Madison* (1 Cranch, 137, at 178):

It is, emphatically, the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

And again, as early as 1829, in the case of *Foster v. Neilson* (2 Peters, 253), the court, having under consideration a treaty between Spain and this government, in an opinion by Chief Justice Marshall, said:

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political not the judicial department, and the legislature must execute the contract before it can become a rule for the court.

The opinion then proceeds to show that the treaty under consideration was not self-executing.

In *Story on the Constitution*, Volume 2, section 1838, it is said:

In regard to treaties, there is equal reason why they should be held, when made, to be the supreme law of the land. It is to be considered that treaties constitute solemn compacts of binding obligation among nations; and unless they are scrupulously obeyed and enforced, no foreign nation would consent to negotiate with us; or, if it did, any want of strict fidelity on our part in the discharge of the treaty stipulations would be visited by reprisals or war. It is therefore indispensable that they should have the obligation and force of a law, that they may be executed by the judicial power and be obeyed like other laws.

So far as we know, the rule as stated so tersely in *Foster v. Neilson* has not been departed from by the Supreme Court.

This court, in *Shaw v. United States* (1 Ct. Cust. Apps., 426), summarized the rule as follows:

The general rule, as laid down by the courts, is that they are bound to give treaties the same effect as the fundamental law of the land as they do the provisions of the laws of Congress. They are denominated "the supreme law of the land," citing *United States v. The Peggy* (1 Cranch, 103); *Strother v. Lucas* (12 Pet., 410, 439); *Foster v. Neilson* (2 Pet., 253, 314). Where, however, by its terms, a treaty speaks in the nature of an executory promise it is the rule that it is not self-executing, and before it can be given the same force and effect as the law of the land action by Congress so legislating must be had.

In numerous cases, as in *Chew Heong v. United States* (112 U. S., 536), *United States v. Lee Yen Tai* (185 U. S., 213), and *United States v. Mrs. Gue Lim* (176 U. S., 459), the Supreme Court has construed statutes and treaties together when they were claimed to be in conflict, and determined which should prevail, and applied the rule that the purpose to evade by a subsequent legislative enactment the solemn engagements of a treaty should not be imputed to the lawmaking body until and unless it was declared in plain terms.

The Assistant Attorney General cites three cases which are claimed to be decisive of these appeals. We will consider them in their order, first stating, without citing familiar authorities in support of the rule, that in construing a judicial opinion it is to be treated as controlling authority only so far as it deals with the point actually involved in the case.

The first case cited is that of *Taylor v. Morton* (2 Curtis, 453; 23 Fed. Cases, 784). That case involved an importation of Russian hemp. Un-

der the Tariff Act of 1842 it was provided that hemp should pay a duty of \$40 per ton, except Manila and Bombay hemp, which should pay \$25 per ton. The collector demanded \$40 per ton on the importation from Russia. The importer protested the payment and brought suit to recover \$15 per ton, claiming that the favored nation stipulation of the treaty of 1832 was operative *ex proprio vigore*, and that Russian hemp was entitled, under such treaty, to as favorable terms as hemp from Manila and Bombay. The opinion was by Mr. Justice Curtis, sitting at the circuit.

The first question discussed in the opinion was stated by the learned justice as follows:

If an act of Congress should levy a duty upon imports, which an existing commercial treaty declares shall not be levied, so that the treaty is in conflict with the act, does the former or the latter give the rule of decision in a judicial tribunal of the United States, in a case to which one rule or the other must be applied?

In discussing this question, the conclusion is reached by irrefragable logic that as under the Constitution laws enacted by Congress and treaties made under the authority of the United States are alike the supreme law of the land, that there is nothing to indicate that the one is paramount to the other, and it follows that where a law is enacted which repeals or abrogates a treaty in whole or in part, the law being later in point of time, must be the rule which controls judicial action. This rule being determined, it is then said:

Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise?

This was negatived, and it was said:

These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws. And it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere in our system of Government. On the other hand, if it be admitted that Congress has these powers, it is wholly immaterial to inquire whether they have, by the act in question, departed from the treaty or not; or if they have, whether such

departure was accidental or designed, and if the latter, whether the reasons therefor were good or bad. If by the act in question they have not departed from the treaty the plaintiff has no case. If they have, their act is the municipal law of the country, and any complaint, either by the citizen or the foreigner, must be made to those who alone are empowered by the Constitution to judge of its grounds and act as may be suitable and just.

It is obvious that in the use of this language it was implied by the learned justice all the way through that the Tariff Act of 1842, in fact fixed a duty of \$40 per ton on hemp imported from Russia, and that the question which was held to be a political one was whether there was just ground for the enactment by Congress of such a law which in effect discriminated against Russian hemp, and therefore to an extent abrogated the treaty with Russia. We do not construe this language as in any way in conflict with the rule that the courts have the right to enforce the subsisting provisions of a treaty as a part of the law of the land. Indeed much of the discussion, in the opinion of Justice Curtis, would have been wholly foreign to the case had such been the view which he entertained.

The opinion then proceeds to discuss the contention that a construction should be placed upon the treaty which would admit Russian hemp, but finds insuperable objections to such construction, and concludes by holding that the terms of the treaty there under consideration imported a contract, and in effect that the provisions were not self-executing. This is in no way in conflict with *Foster v. Neilson* (*supra*).

The next case cited is *Bartram v. Robertson* (122 U. S. 116). In that case unrefined sugar and molasses, the produce and manufacture of the Isle of St. Croix, a part of the dominions of the King of Denmark, were imported and the tariff duty fixed by general statute was demanded and paid. The plaintiffs claimed that the goods should have been admitted free of duty under the treaty with Denmark, because like articles, the produce and manufacture of the Hawaiian Islands, were under the treaty with their king, and by the Act of Congress of August 5, 1876, admitted free of duty, and brought suit to recover the amount paid. The court proceeded to construe the first article of the treaty with Denmark, by which the parties engaged—

mutually not to grant any particular favor to other nations in respect of commerce and navigation which should not immediately become common to the other party, but should enjoy the same freely, if the concession were freely made, or upon allowing the same compensation, if the concession were conditional—

And the fourth article, which provided that—

no higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominions of his majesty the King of Denmark; and no higher or other duties shall be imposed upon the importation into the said dominions of any article the produce or manufacture of the United States, than are, or shall be, payable on the like articles, being the produce or manufacture of any other foreign country.

The treaty between the King of the Hawaiian Islands and the United States purported to be and was in fact made upon a consideration moving from Hawaii to the United States. The decision of the point involved was as follows:

Those stipulations, even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties, the United States and the King of Denmark, to each other, that, in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other, there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual, for reciprocal advantages. "No higher or other duties" were to be imposed by either upon the goods specified; but if any particular favor should be granted by either to other countries in respect to commerce or navigation, the concession was to become common to the other party upon like consideration; that is, it was to be enjoyed freely if the concession were freely made, or on allowing the same compensation if the concession were conditional.

The conclusion of the opinion is:

The treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions. On the contrary, the treaty provides that like compensation shall be given for such special favors. When such compensation is made it will be time to consider whether sugar from her dominions shall be admitted free from duty.

Clearly this case does not hold that the question of the force and effect of an existing treaty is a nonjudicial one.

The last case cited is the case of *Whitney v. Robertson* (124 U. S. 190). In that case there was under consideration a treaty with the Dominican Republic, which was claimed to entitle the importer to free importation of sugar and molasses under the same treaty with the King of the

Hawaiian Islands, that was under consideration in *Bartram v. Robertson*. It was held in that case that following *Bartram v. Robertson*, and referring to the ninth article of the treaty with the Dominican Republic, and stating that it was substantially like the fourth article of the treaty with the King of Denmark—

That it is a pledge of the contracting parties that there shall be no discriminating legislation against the importation of articles which are the growth, produce, or manufacture of their respective countries, in favor of articles of like character, imported from any other country. It has no greater extent. It was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other. It would require the clearest language to justify a conclusion that our Government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.

This is but a declaration of the now well-recognized rule that the favored-nation clauses in various treaties do not prevent reciprocity agreements fixing lower duties or admitting importations free from other countries upon consideration passing from such country to us.

The rule is fully recognized in the opinion that self-executing treaties are a part of the law of the land, and it is said:

If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

And after discussing the case of *Taylor v. Morton*, it is further said:

It follows, therefore, that when a law is clear in its provisions, its validity can not be assailed before the courts for want of conformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the Government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will.

We do not read this opinion as affirming that the courts can not in any case construe or give effect to existing treaties, but quite the reverse. The opinion considers a self-executing treaty as a part of the law

of the land. It also declares in terms that it is the duty of the court to construe and give effect to the latest expression of the sovereign will. The case does hold, what is conceded by the importers' counsel in the present case, that if the treaty provisions have been repealed by an Act of Congress, they are no longer of force, and that the considerations of justice, equity, or policy of such repeal, or whether such action of Congress was had with due regard to the rights of the treaty nation, are not questions with which the courts can deal, and this we fully recognize.

No contention appears to be made in the present case that there has been any direct repeal of the treaties here under consideration, or of any of their provisions. Indeed the concession of counsel for the government would seem to imply that the treaties are still in full force, the contentions being limited to the points stated at the outset of this opinion. But there is language in *Whitney v. Robertson* which would seem to imply that an Act of Congress which imposes duties upon commodities of all kinds, making no exception in favor of the goods of any country, is to be treated as a repeal of the provisions of the treaty *pro tanto*. It is said:

The act of Congress under which the duties were collected authorized their exactation. It is of general application, making no exception in favor of goods of any country. It was passed after the treaty with the Dominican Republic, and, if there be any conflict between the stipulations of the treaty and the requirements of the law, the latter must control.

This is a correct statement of the law. But it could hardly have been intended by this language to declare that an enactment of a general law imposing uniform duties upon all imports would have the effect of abrogating treaties such as these here in question, in whole or in part. Such a general enactment is not in itself a departure from the treaty provisions but rather, as it applies alike to all nations, in furtherance of its provisions, establishing as it does a uniform rate among all nations, and is therefore in no sense inconsistent with the treaty. It would seem that there was some confusion in applying the rule, which is correctly stated. The first departure from the treaty provisions by Congress, if any departure was shown, occurred when the treaty with Hawaii was made, and approved by Act of Congress. That is to say, there was free entry accorded to importations from Hawaii, and except for the considerations which passed from Hawaii to the United States, that

Act would have been in conflict with the treaty. The question therefore of the effect of a treaty with Hawaii and whether it operated to give the same rates as those granted to the Dominican Republic, was before the court, and would appear to have been the real question which stood for decision. The court had already determined that the treaty with Hawaii, when construed with the treaty with St. Domingo, did not have the effect of admitting the importations of the latter country free, and as an additional reason stated the rule that if there is any conflict between the stipulations of the treaty and the requirements of the law, the latter must control. But in this case we discover no indication of a purpose on the part of the court to depart from the rule that a treaty is to be treated as a part of the law of the land.

We think it is manifest that in both these cases, *Taylor v. Morton* and *Whitney v. Robertson*, the court proceeded upon the view that the purpose of Congress was to fix a different rate of duty upon importations from Bombay in the one case and from the Hawaiian Islands in the other than that exacted from the nation claiming under the favored-nation clause, and that this intention had been manifested by an enactment later in point of time than the treaty under consideration. As the later law displaced the earlier (the treaty), it is obvious that the courts could not negative the legislative enactment clearly expressed, and that therefore the treaty stipulations could not be controlling.

So in this case, unless it may be said that the enactment by Congress of section 2 of the Act of July, 1911, when construed with the existing treaties, legally imported that whatever grant of rights was made by such act should immediately inure to the benefit of the treaty nations, the importers must fail in their contention. As to what constitutes self-executing provisions, see Cooley's *Constitutional Limitations* (p. 119).

In an article by Justice Day, in 38 *Cyc.*, page 972, it is said:

When a treaty does not require subsequent legislation to render it effective, after ratification it is the law of the land and will be enforced by the courts the same as a Federal legislative act; but where a treaty is incomplete within itself and requires subsequent legislation to render it effective, manifestly it can not be enforced by the courts until such necessary legislation is had; such as, for instance, where an appropriation of money is necessary to carry the treaty into effect, and until Congress makes such an appropriation the treaty is incomplete, for under the constitution money can not be appropriated by the treaty-making power. A treaty is to be regarded in courts of justice as equivalent to an act of Congress whenever it operates of itself without the aid of any legislative provision; but when the terms of the stipulation import a contract, or when either of the parties engages to perform a particular

act, the treaty addresses itself to the political and not the judicial department of the Government.

We take it that what is meant by the language quoted is that the treaty must fix a right which, in the state of things existing when it is invoked in the courts is capable of enforcement by the courts. The right is necessarily one defined in the treaty itself, but the conditions under which the treaty becomes operative may be fixed by subsequent legislative changes.

This is illustrated by the case of *United States v. Forty-three Gallons of Whisky* (93 U. S. 188). In that case a treaty was concluded between the Red Lake and Pembina bands of Chippewa Indians of the United States on the 3d of October, 1863, and was proclaimed May 5, 1864. This treaty provided, among other things, that—

the laws of the United States now in force or that may hereafter be enacted prohibiting the introduction and sale of spirituous liquors in the Indian Territory shall be in full force and effect throughout the country hereby ceded until otherwise directed by Congress or the President of the United States.

By the Act of March 15, 1864, a penalty was imposed upon any person who should introduce or attempt to introduce any spirituous liquor or wine into the Indian country. It was said in the case:

The power to define originally the "Indian country," within which the unlicensed introduction and sale of liquors were prohibited, necessarily includes that of enlarging the prohibited boundaries whenever, in the opinion of Congress, the interests of Indian intercourse and trade will be best subserved.

It is true Congress has not done this, but the Constitution declares a treaty to be the supreme law of the land; and Chief Justice Marshall, in *Foster and Elam v. Neilson* (2 Pet., 314) has said "that a treaty is to be regarded, in courts of justice, as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision." No legislation is required to put the seventh article in force, and it must become a rule of action if the contracting parties had power to incorporate it in the treaty of 1863. About this there would seem to be no doubt.

It will be noted that this treaty was made operative only when the statute affixed a penalty to an importation of liquors into the Indian country when it was held the treaty at once attached itself to that provision, and the status of the territory ceded by the treaty to the United States was fixed by the treaty, and the subsequent legislation was given force therein. The case is closely analogous to the present if the view be adopted that the provision of the treaty that "if either party shall hereafter grant to any such nation any particular favor in navigation or

commerce it shall immediately become common to the other party" is the controlling provision or a provision permissible to be considered in this case.

Upon this subject the opinion of the Attorney General *In re Norse American Line of Steamers* (14 Opinions, 468), is forcefully in point. That opinion construes a treaty provision with Sweden, contained in Article 2 of the treaty of 1783, in which the King of Sweden and the United States mutually engage not to grant thereafter any particular favor to other nations in respect to commerce and navigation which should not immediately become common to the other party (8 Stat., 62), and Article 8 of the treaty with Sweden and Norway of July 4, 1827 (8 Stat., 350), reading:

The two high contracting parties engage not to impose upon the navigation between their respective territories, in the vessels of either, any tonnage or other duties of any kind or denomination which shall be higher, or other than those which shall be imposed on every other navigation, except that which they have reserved to themselves, respectively, by the sixth article of the present treaty.

By Article 4 of the treaty between the United States and Belgium of July 17, 1858, it was stipulated that steam vessels of the United States and Belgium engaged in regular navigation between their respective countries should be exempt from the payment of duties of tonnage, anchorage, buoys, and lighthouses. It was said in the opinion:

From the simple reading of these treaty provisions in the order above set forth, the conclusion is inevitable that whatever favors or exemptions are enjoyed by the regular steam navigation of Belgium plying between that country and the United States are "common" to the like navigation of Sweden and Norway. For "no higher or other duties" can be imposed upon it in the ports of the United States than are imposed on every other navigation. The Departments of State and the Treasury concede that the claim of this Norse line of steam vessels to be exempt in the ports of the United States from the payment of duties of tonnage, etc., is just and reasonable, and they are brought to this concession by an examination and review of the treaty provisions above set forth. But if it is just and reasonable, now and in the future, that steam vessels of Sweden and Norway, engaged in regular navigation between those countries and the United States, should be exempt, in the ports of the latter, from the payment of tonnage duties, it has been so at all times in the past, since the ratification of the treaty with Belgium of July 17, 1858. No language can make this plainer than it is upon the face of the treaties.

* * * * *

It results from what has been said that the moneys which have been paid for duties of "tonnage, anchorage, buoys, and lighthouses" by the "Norse American Line" of

steamers to the customs officers of the United States have been exacted contrary, therefore, to law.

This opinion is important in two aspects: First, it in effect holds that the general provision providing that any special favor shall immediately become common to the other party is operative, notwithstanding special provisions relating to the particular subject of navigation. Secondly, it holds that the treaty with Belgium was in effect a new law, and that the effect of such new law not in terms relating to the treaty with Sweden has the force of creating a state of facts upon which the treaty with Sweden became operative, and authorized refund of money by the Treasury *without legislative change*. If such is the effect of a treaty with a particular country, which amounts to no more than a new law relating to such country, it would seem that the same rule should be taken as to subsequent legislation; that there can be no distinction between a state of things created by subsequent treaty with another nation and a state of things created by statutory enactment, if such conditions are created as are provided for by the treaty invoked.

It is said that this provision, although present in the treaty with Russia, was not invoked in the case of *Taylor v. Morton*, but that discussion was confined to the first clause, which was held to be promissory. This fact alone would demonstrate that this case is not authority in support of the proposition that the second clause is not self-executing nor that it is not applicable to the case here presented. But this is not all. The reason why the second clause was not invoked is clear. The Act under which the tax was laid in terms fixed a duty of \$40 per ton on all hemp except manila, suera, and other hems of India, on which a duty of \$25 per ton was laid. There was clearly no room for the operation of either article of the treaty except as a promissory agreement, for Congress had by differentiating the duty between Bombay hemp and Russian hemp left no room for inference that the intent was to fix a like rate on both, and had excluded the legal consequences which would follow upon the establishment of a rate of duty on Bombay hemp in the absence of express language excluding Russian hemp. Indeed, the contention was made that as Russian hemp was not specially named, the true construction of the Act should be—

upon all unmanufactured hemp not hereinafter excepted either expressly or by force of the treaty with Russia the duty is to be \$40 per ton and upon those so excepted \$25 per ton.

This construction was not allowed. It was said to do violence to the language of the Act. What the case decided was that as the Act of Congress had laid a duty on Russian hemp of \$40 per ton, and as the Act was of later date than the treaty, the court was bound by such later enactment.

It has been suggested that Article 9 above quoted is not a controlling provision of the favored nation treaty; that Article 5, providing against the imposition of higher duties by each contracting nation than are imposed upon those of any other nation or country, exhausts that subject; and that Article 9, in providing that if either party shall grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, can not be held to have reference to importations. But if the treaty be examined, it will be found that the subjects of commerce and navigation are treated of in various paragraphs of the treaty preceding Article 9 in question. In fact the first eight articles are devoted to those subjects. If it be said that full treatment of either of these subjects as declaratory of rights excludes such subject from the provisions of Article 9, then it follows that Article 9 has *nothing whatever to act upon*. It relates to a particular favor in *navigation or commerce* and both subjects are dealt with *equally in the preceding eight articles*. The fair interpretation is therefore that while Article 5 declares the right and is promissory in its terms, and provides against legislation which shall impose higher duties upon articles imported from one nation to the other than are imposed upon articles from any other foreign nation, Article 9 was designed to provide a remedy or declare a right which attaches not in case of such adverse legislation, but in case conditions shall arise which make room for its operation, namely, when a particular favor, either in navigation or in commerce is granted to some other nation. Whenever this occurs, then Article 9 has operation and not before, either as it affects navigation or commerce. That the introduction of commodities from Canada into this country is commerce needs only to be stated to be accepted. It seems clear, therefore, that this article has application in the present case.

The result of the decisions we think is this, that the courts will not enforce a treaty which is executory in its character for the obvious reason that it has not the power to do so. Legislation must be had to give effect to such executory provisions. The courts, under the constitutional provision that a treaty is like a law of Congress a part of the law

of the land, will, as to a self-executing provision in a treaty, enforce it whenever the occasion and conditions arise which attach the self-executing provision to existing facts. Where it is claimed that a treaty and a subsequent congressional enactment conflict, it is essential, and it has been common for the courts, to construe the treaty with the law to ascertain whether the latter displaces the former, or whether it creates a condition to which the self-executing provisions of the treaty apply.

We proceed to consider whether the provisions of these treaties are self-executing.

Take as an illustration our treaty with Austria-Hungary:

No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominions of Austria; and no higher or other duties shall be imposed on the importation into the dominions of Austria of any article, the produce or manufacture of the United States than are or shall be payable on the like article, being the produce or manufacture of any other foreign country. * * *

If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party. * * *

Similar provisions are contained in other treaties, but as it is conceded by the government in the present case that the position of each of the nations whose products are here in question is equal to that of the one having the most advantageous treaty, we need not set them forth at length.

If this were an agreement between parties, there would be little difficulty in saying that this is a self-executing provision. The grant of any privilege by one party to the contract to a third person would under such language as that employed immediately inure to the benefit of the other party to the contract. We see no reason why the same interpretation should not be placed upon the language of a treaty. The privilege could not immediately become common to the party to this agreement if it depended upon some future act by another or upon further legislation to make the same effective. If legislation were required before it could be given effect, it would be a contradiction of terms to say that the privilege immediately became common to the parties to the treaty. A more inapt term intended to convey a promise of a future legislative grant of a right could hardly have been devised.

This brings us to a consideration of the Act of July 26, 1911. The section involved reads as follows:

Pulp of wood mechanically ground; pulp of wood, chemical, bleached, or unbleached; news print paper, and other paper, and paper board, manufactured from mechanical wood pulp or from chemical wood pulp, or of which such pulp is the component material of chief value, colored in the pulp, or not colored, and valued at not more than four cents per pound, not including printed or decorated wall paper, being the products of Canada, when imported therefrom directly into the United States, shall be admitted free of duty, on the condition precedent that no export duty, export license fee, or other export charge of any kind whatsoever (whether in the form of additional charge or license fee or otherwise), or any prohibition or restriction in any way of the exportation (whether by law, order, regulation, contractual relation, or otherwise, directly or indirectly), shall have been imposed upon such paper, board, or wood pulp, or the wood used in the manufacture of such paper, board, or wood pulp, or the wood pulp used in the manufacture of such paper or board.

Putting aside for a moment the question hereafter to be considered as to whether this section 2 is an agreement based upon consideration, so that within the American doctrine it is not a violation of the favored-nation provision, but treating it as a direct grant of the right to Canada to import freely its wood pulp and print paper, what is its force and effect as affecting the products of other nations having treaties containing the favored-nation clause? Counsel for government say in their brief:

Neither does the United States as a litigant here claim that the assessment of duty on the importations in question is to be sustained on the ground, other arguments failing, that in any case Congress had the naked power to violate and destroy these treaties by its later act, and that effect must be given to the act of Congress, even though it be accomplished by this momentous and deplorable logic. The congressional transactions at the time of the passage of the act indicate very clearly that Congress had not only no intention of thereby violating or putting an end to these treaties, *qua* treaties, but rather the contrary. That question was considered in Congress, and also the possible effect of these treaty clauses in making the provisions of section 2 available to the treaty countries was discussed. There was no agreement of opinion among the Members of Congress on the latter proposition and the matter was allowed to rest upon the understanding that the act should pass, the Government to abide by the construction which should later be placed upon it by duly constituted authority.

This is a correct statement of the attitude of Congress as indicated by the debates in the Senate. It would appear that having in mind these provisions Congress proceeded to enact section 2 with a full understanding that the question would arise thereunder whether the pro-

visions of the treaties with favored nations would attach, and whether by the very force of such enactment like commodities from other nations having the favored-nation clause would be admitted on the same terms as they were from Canada. (*Record*, 62d Cong., 1st Sess., Vol. 47, No. 29, pp. 2258-2818.)

If we assume, as counsel for government appears to, that there was no purpose on the part of Congress by the Act of July 26 to violate these treaties, it would seem to follow that the self-executing provisions of these treaties would at once be brought into force and that a lawful Act of Congress admitting certain products of Canada into this country free of duty would immediately inure to the benefit of the other parties to these treaties. Indeed, it is difficult to know just when such a provision as that contained in this treaty could have operation at all except it be in a case where lawful authority had granted a new privilege to some other nation. It is equally difficult to know why, when that privilege is so granted, the terms of the treaty do not at once apply in favor of the parties to the treaty. If the treaty be a part of the law of the land, and if there was no purpose on the part of Congress to violate or put an end to the treaty, it would seem very clear that the treaty and the Act in question are laws *in pari materia* and must be so construed. It is undoubtedly true that where a provision is enacted conferring rights upon another nation, on a condition which would require some affirmative act by parties to the treaty before they could bring themselves within its provisions, at least the case should show that such action had been taken before their rights would inure under this favored-nation provision. But if it be assumed that here there is no more than a naked grant of right, and nothing remains under the terms of the treaty to be done by either party to the treaty, it would logically follow that its grant of this privilege to Canada was expected to be followed by the consequences provided for by the treaty, and that the goods of other countries should be admitted on the same terms as are those admitted from Canada. (See 14 Opinions Attorneys General, 468; *U. S. v. 43 Gallons of Whisky*, 93 U. S., 188; *McEvoy v. Wyman*, 191 Mass., 276; *In re Scutella's Estate*, 129 N. Y. Sup., 20.)

This brings us to a consideration of the question whether there was consideration for this special grant to Canada of the right of free importation. It is said that the appellants have not shown that this grant to Canada was voluntary and not founded upon sufficient consideration, and it is argued that in international bargains, as well as in private agree-

ments, the existence of consideration is a question of fact always requiring proof for its establishment, whether the whole consideration is recited in the instrument or not. We think the answer to this is that section 2 is a provision standing by itself. There is nothing to indicate any consideration other than that found within its provisions if there be such, and there is no hint or suggestion that there is *aliunde* evidence of such consideration. This provision is wholly independent of the reciprocity provision of the Act. It is an Act of Congress, standing by itself. It would be a novel procedure to attempt to show what considerations controlled Congress other than those which appear in its published proceedings.

It is also suggested that it is conceivable that the government gave Canada concessions contained in section 2 as an inducement to her to introduce and try to pass the reciprocity schedule. But it is sufficient answer to this to say that there is no evidence afforded by the Act itself that such was the inducement or that there was in fact any agreement to introduce and try to pass the reciprocity schedule based upon the consideration of the enactment of section 2. Furthermore, such consideration is negatived by the fact that section 2 was made effective at once and independently of either action or attempted action by the Canadian Parliament.

But it is urged that there is in the terms of section 2 itself evidence of a sufficient consideration which brings this case within the rule established by courts and in diplomatic correspondence of the Department of State that where a special privilege is granted to a particular nation upon a peculiar consideration passing from such nation to this government, an agreement permitting free importation of an article at a lower rate is not in conflict with the favored-nation clause, and illustrations of this have already been pointed out by reference to *Whitney v. Robertson* and other cases. But were there special concessions exacted of Canada as a condition to free importation of wood pulp and paper which would not apply to other paper of other countries in like circumstances?

The language of section 2 above quoted is open to two possible constructions: The first is a construction which affixes as a condition to free entry the establishment of free exportation of all wood pulp and pulp wood from all parts of Canada. The second construction is one which attaches the condition to the specific importation and results in admitting free all the products named whenever such product, untaxed, has been produced from wood also untaxed. It is to be noted that the

first construction has not been adopted by the Treasury Department. The second has obtained, and without repeating or enlarging upon the reasoning of Judge Martin in the Cliff Paper Company case, it will suffice to say that we are agreed that the construction which has obtained since the enactment of the statute is the correct one.

It follows that a nonprohibited exportation from any nation having the favored-nation clause of an untaxed material of the same kind and character answers all the requirements and should stand upon the same footing as the goods so imported from Canada. It will not do to say that wood pulp and wood are more accessible from Canada than from other countries. The treaties speak in no such language of distinction. They recognize no difference between nations in different quarters of the globe. If any exception or reservation from the language of the treaty is to be made, it must be made by an authority which has power to abrogate the treaty in whole or in part. It does not lie with the courts or with an administrative department to annex or affix conditions to a treaty which is, unless abrogated by a legislative enactment, the supreme law of the land.

The decision of the Board of General Appraisers is reversed and the importation admitted free.

SMITH, BARBER, and MARTIN, JJ., concur. [Dissenting opinion by DE VRIES, J.]

BOOK REVIEWS

De Jure et Officiis Bellicis et Disciplina Militari. Ayala, Balthazar. Edited by John Westlake. Vol. I. A Reproduction of the edition of 1582, with portrait of Ayala, Introduction by Professor Westlake, etc. pp. xxvii + 226. Vol II. A translation of the text, by John Pawley Bate. pp. xvi + 245. Washington: Carnegie Institution, 1912.

This work is the second in the series, "Classics of International Law," published by the Carnegie Institution. The two works, Holland's edition of Zouche and Westlake's edition of Ayala, have brought to their service two of the most prominent English scholars of the day. Westlake's work now under review is one of his last literary contributions to the science of which he was such a distinguished leader.

The editor's introduction of 27 pages gives a useful biographic account of Ayala, points out the place in legal literature which his work occupies, and furnishes a brief critical summary of the book itself, which in this edition is a photographic reprint of the 1582 edition. To the translation of a difficult text, Dr. Bate has given a degree of care and the fruits of a profound scholarship which entitle him to special commendation. The translation is an achievement in itself.

Ayala (1548-1584), a native of Antwerp under Spanish sovereignty, occupied an office comparable with that of "judge-advocate-general" of the armies of Philip of Spain. His book *De Jure et Officiis Bellicis* is an attempt to record certain rules of conduct (including the morals and ethics) of internal military discipline, of actual war and of incidental belligerent relations. His service under the Spanish Emperor, particularly during the war against the rebelling Netherlands, accounts in part for his doctrines and point of view. He would today be considered a reactionary of a severe type. A precedent is a sacred monument to him, and any questioning of constituted authority is a reprehensible offense. Undoubtedly with the Dutch revolt in mind, he characterizes rebellion as an abhorrence, comparable to heresy. Rebels he does not consider lawful enemies, and he believes there is no duty to keep faith with them.

In many respects his book is an illustration of a 15th or 16th century tract, written to uphold the divine right of kings as opposed to the popular will. His justification for the unrestricted power of royalty will be interesting to modern constitutional lawyers. The book is not a concise treatise, for the author indulges in frequent disquisitions on ethics and often deviates at length on unrelated issues. It displays much versatility of learning, and attests a certain breadth of scholarship. The looseness in construction may be ascribed to the fact, as the editor points out, that during his actual service with the army Ayala threw together into the form of a book a mass of notes which he had gathered during many preceding years. The author is not considered an original thinker, but he records the existing thought of his time, to which he brings the experience of actual practice in the conduct of war, as legal adviser to one of the most powerful monarchs and greatest armies of his day. The work at the present time has little more than a historical value. Grotius, although well acquainted with the book, made but little use of it. Modern students will find it interesting as showing the wide difference between Ayala's rough and harsh rules for the conduct of war and the modern humane detailed principles and rules developed from Lieber's rules of 1863 and the conventions of Brussels, Geneva and The Hague.

The work is divided into three books, of which only the first deals actually with the rules of war and international law. This book takes up the moral causes of war, and then proceeds to the legal aspect. Strangely enough, the duel or single combat is the subject of a chapter. Among other matters there are taken up the questions of reprisals, their justification and the practice; capture in war and postliminy; the treatment of prisoners and ransoms; keeping faith with the enemy; various kinds of treaties and agreements during war; lawful stratagem and fraud in war; and the rights of ambassadors. Book II is a treatise on the maxims of policy and prudence in the conduct of war and statecraft in general; and Book III is concerned with military discipline and administration.

The present edition is marked by the same painstaking attention to style, form and general detail which characterizes the first volume in the series. The workmanship throughout is excellent. *Defaqoz* (p. iii) should be *Defaqoz*.

EDWIN M. BORCHARD.

La Dichiarazone di Londra Relativa al Diritto Della Guerra Marittima.
By Prof. Enrico Catellani. Padova: Fratelli Drucker. 1912,
pp. 111.

Professor Catellani offers in this little work a critical study of the Declaration of London with particular reference to the provisions in which it may be held to have departed more or less from the ostensible purpose of presenting a codification of the existing law as to naval prizes, and those which have aroused unfavorable criticism, either from the point of view of particular national interests or of the theory of international law.

The Hague Conference of 1907 adopted a convention for the establishment of an International Prize Court. In the following year, an international conference was called on the initiative of the British Government for the purpose of agreeing on the principles of law to be applied by the proposed court. The rules agreed upon at the conference and which form the substance of the Declaration, are in a preliminary provision stated to represent substantially the generally recognized principles of international law.

On this subject of prize law, however, many varieties of national law existed, produced very largely by national self-interest. A supremely strong naval power such as Britain, possessed of a large mercantile marine, had special interests which naturally have tended to create a special system of national law. The recent rise of new naval powers to a competing position further complicated the situation, and, as a consequence, many points arose on which opinions differed, and—what is perhaps even more important—interests differed. The result was in some cases an evasion of the difficulty, in many other cases a compromise advantageous or supposed to be advantageous to one party or the other.

The author takes up in succession the various subjects of discussion which were finally reduced to specific rules, viz.: blockades, including the question of the continuous voyage and the requirement of notification to neutral ships; contraband of war, the uncertainties of which were materially reduced by the enumeration of two lists, one of articles *never* to be regarded as contraband, and the other of articles always so considered; the matter of conditional contraband with special reference to food-stuffs gave rise to a radical difference of opinion in which the contentions of Great Britain were finally rejected in favor of those of Germany.

Even more critical was the difference which was developed in reference to the destruction of prizes and particularly in reference to the case where the only ground alleged for the destruction was the inability of the capturing vessel to furnish a crew to take charge of the captured vessel.

On the point of the right to convert a commercial vessel into a warship on the high seas, an operation opposed by the British delegates, the conference was unable to reach any decision, but the omission to formulate any rule on the subject may in fact be regarded as another defeat for the British views, so much so that even some of the English supporters of the Declaration have suggested its ratification with a saving clause as to this question.

Other points are noted which are left undecided, or the statement of which in the Declaration contains ambiguities or uncertainties. And a further source of future doubts and differences is found in the question whether the report of the committee which drafted the Declaration is to be considered by the proposed court as an authoritative source of construction. Each view has found defenders and an analysis shows that on certain matters the Report and the Declaration are not clearly and entirely in accord, so that the question is not by any means academic.

The attitude of the author towards the Declaration is somewhat critical, and he would appear to be not without sympathy for the strenuous agitation against the ratification which sprang up in Britain and which had its excuse in the various rather important points on which British contentions, founded largely on British interests, were defeated. It is undoubtedly true, and there is reason to think that Prof. Catellani adopts this point of view, that in many of these cases the contention of Britain was in the line of progress and humanity; but it was as evidently dictated by perfectly justifiable and proper self-regard, and on this side was subject to compromise and a reasonable appraisement of gain and loss on every concession made. It is on such a sober appraisal of gain and loss that the justification of the British delegates, and after them their government, in their final acceptance of the whole document must rest. The matter is still in controversy so far as regards the adoption of national legislation in several countries (including Great Britain) to carry out the purposes in view, and constitutional questions of considerable importance have arisen in this connection.

Prof. Catellani concludes with a statement of his view as to the course that should be adopted by his own country in the matter. His opinion,

like that of the British opponents of the Declaration, is unfavorable to the work of the conference as it stands, and he recommends that Italy should decline to ratify and should call for the reconvening of the conference for the purpose of clearing up obscure points and supplying omissions, and that the International Prize Court should not be constituted until the codification of the law is complete and generally accepted. This is in consonance with his view that the main object of the conference was to withdraw from the proposed court the power of making law by its decisions on open points.

There is much to be said for his attitude, as for that of the British objectors; but it cannot be doubted that the probable result would be to reopen much for discussion, with perhaps little hope of reaching a satisfactory decision; and that on many of the points raised no other solution than one by way of compromise was practically possible.

He concludes with a fling at the over hasty doctrinaires which would appear to indicate that, after all, his quarrel with the Declaration is not so much one of detail, but is based on a pretty firm conviction that the time is not yet quite ripe for the surrender of any substantial power to an international court.

JAMES BARCLAY.

The Two Hague Conferences. By Joseph H. Choate, The Stafford Little Lectures for 1912. Introduction by James Brown Scott. Princeton University Press: 1913. pp. xiv, 109.

First Delegates to international conferences are usually too busy, both at home and abroad, to write accounts of the conferences in which they participate. It is therefore a fortunate fact that the two First Delegates from the United States to the Hague Conferences of 1899 and 1907, who made so large a part of the history of those conferences, have had time to write short histories of them also. These histories are not formal and detailed accounts, it is true; but Mr. White's reminiscences of the First Hague Conference, first published in his *Autobiography* and recently reprinted in handy form, and Mr. Choate's two lectures on both Hague Conferences, just published in the booklet under review, are as interesting and suggestive as they are stimulating and important.

Mr. Choate's well known lucidity of expression and lightness of touch, together with the impression of his undaunted optimism and flashes of his old-time eloquence,—as in his discussion of religious warfare (p. 17), mediation (p. 25), and the significance of a world-assembly (p. 90),—combine to make these lectures instructive, entertaining and inspiring.

Despite the arbitrary length of lecture hours, the problem of proportion in dealing with the immense amount of materials connected with the two conferences has been well solved. To the first conference, are devoted forty-two pages; to the second, forty-six pages; and to "Notes," which are chiefly bibliographical in character, fifteen pages. By way of "Introduction," Dr. James Brown Scott contributes ten pages, which are devoted to signalizing Mr. Choate's own part in the deliberations and measures of the second conference in connection with the summons of a third conference, the Prize Court, the Court of Arbitral Justice, and a world-treaty of obligatory arbitration. This "Introduction" is written with its author's characteristic graciousness, and supplies some of the deficiencies caused by the modest reticence of the lecturer himself.

Mr. Choate, of course, says but little of the measures adopted by the conferences for the mitigation of the evils of war; and it is an omission to be regretted that he did not add his condemnation to that of Mr. White for the obstinate stand taken by the United States delegation in 1899, and not reversed in 1907, against the opinion of all the rest of the world in regard to the prohibition of projectiles for the diffusion of asphyxiating gases and the use of "dum-dum" bullets.

He emphasizes, naturally, the measures of the first conference for the prevention of war, and commends unreservedly both mediation, which he believes could have been applied successfully to the prevention of the Turco-Italian War, and commissions of inquiry, a resort to which he argues could have prevented the Spanish-American War. The greatest achievement of the first conference, he considers to have been the establishment of the Permanent Court, for the six reasons that it has based arbitration on *law*, instead of on *compromise*; it has declared arbitration to be the *best* method of settling at least judicial or treaty questions between nations; it has provided as the sanction of its decisions a mutual agreement between the nations and the public opinion of all civilized men; its decisions are becoming the source of genuine international law; it has given an extraordinary impulse to the negotiation of arbitration treaties and the arbitral settlement of international disputes; and it has educated public opinion in favor of arbitration, with unprecedented rapidity and to an unprecedented degree.

The great achievements of the second conference, Mr. Choate considers to have been six in number, three *in esse*, and three *in posse*: First, the adoption of the Porter proposition, which he does not call by

that name, but the credit for which he gives entirely to General Porter, and which he regards as a triumph of compulsory arbitration; second, the establishment of the Prize Court, which was made possible only by reason of Mr. Choate's own persuasive mediation between the conflicting demands of Great Britain and Germany; third, the summoning of a third conference, under international, instead of Russian, auspices; fourth, the support gained from the votes of twenty-one nations for the American proposition to exempt private property from capture in warfare upon the seas; fifth, the unanimous adoption of the project of the Court of Arbitral Justice,—and here he failed to do justice to his own and Dr. Scott's herculean and epoch-making labors in its behalf; and, finally, the very large measure of support, from thirty-two nations, gained for a world-treaty of obligatory arbitration.

With such a list of achievements, there is small wonder that Mr. Choate carries his reader with him in his own rejoicing over the progress made by international peace since the meeting of the First Hague Conference, and his own optimism as to the still greater progress to be anticipated from the third and successive Hague Conferences.

With so much that is excellent to be grateful for in Mr. Choate's account of the conferences, it may seem invidious to refer to what seems, in the humble opinion of the reviewer, to be a lamentably defective feature of it. That is, his discussion of the question of armaments.

He gives his cordial approval of the statement in the Czar's rescript of 1898, that "the maintenance of general peace, and a possible reduction of the excessive armaments which weigh upon all nations, present themselves in the existing condition of the whole world as the ideal towards which the endeavors of all governments should be directed." But it is evident that his immediate sympathies lie only with the first part of this ideal, "the maintenance of general peace"; while the second part of it, the "possible reduction of the excessive armaments which weigh upon all nations," he regards as "another dream which it will take perhaps another century to realize." This discouraging outlook might have been brightened by his own comments (pp. 41-44) on the "astonishing change which has taken place in the attitude of public men, as well as private citizens, throughout the world on the peace movement," within a few years, and on the abolition within a single generation of the slave-trade and domestic slavery, respectively.

He declares that the general attitude of Germany on such questions as the establishment of the Permanent Court is "Not yet, not yet,"

and he has all too good reason to remember Baron Marschall von Bieberstein's "Noch nicht," "Mañana," and "Non possumus," which he opposed to Mr. Choate's own gallant and magnificent struggle for the adoption of a world-treaty of obligatory arbitration. To use Mr. Choate's own quotation (p. 44), it behooves us to remember that:

"Blind unbelief is sure to err,
And scan His work in vain;
God is His own interpreter,
And He will make it plain."

He discourses convincingly (pp. 55-57) on the depreciation of the second conference by the London *Times*, which he characterizes as "one of those flagrant political libels, of which even the greatest newspapers are sometimes guilty"; and this might have led him to concede that at least a limitation of armaments is one of those probabilities, which, denounced as impossible by even the greatest statesmen of one generation, become the realities of the next.

He declares that "man is a fighting animal"; and, although he does not differentiate between the various species and genera of "fighting" in this twentieth century, he appears to deduce from it the "necessity" and "righteousness" of "some" wars. At the same time, he endorses the prohibition, by both conferences, of warfare in the air. Now, if man is and of right ought to be a fighting animal, and since he has ceased to be merely terrestrial, and become aerial as well, why attempt to prohibit his fighting in or from the air? Or, if that can and should be prohibited, why not prohibit also his fighting on land and sea?

The sad truth would seem to be that Mr. Choate, believing with Mr. Roosevelt, whom he quotes on this point with approval (p. 63), that "the Monroe Doctrine will keep good as long as *we* [the italics are the reviewer's] are strong enough to make it good," stands for the "big, bigger, biggest" naval policy for U. S., and considers that *our* navy is solely for the preservation of peace, or for the defence of what *we* deem justice. At the same time, he considers (p. 49) that the Russo-Japanese War "demonstrated the truth of the prophecies of the Czar Nicholas II himself in his famous rescript of August 24, 1898, as to the fatal effects of great and growing armaments upon the nations who indulged in them."

Oh, wad some power
The giftie gie us
To see oursels,—as we see others!

Finally, Mr. Choate gives high praise to Mr. Taft (p. 83), for "proposing that all questions without reservation should be settled by arbitration, rather than by a resort to war"; and yet he does not consistently apply the axiom that the constant and competitive increase of national armaments is the prime obstacle in the path of international arbitration and justice, and that an international limitation or reduction of armaments would be the most powerful incentive to the adoption of a world-treaty of arbitration, and to the habitual resort to the Permanent or Arbitral Court.

But even the bow of Achilles cannot hit every mark. Mr. Choate's championship of arbitration in the Second Hague Conference has taken its place in history, starred with imperishable gratitude; and the reader of his account of the two conferences will not prevent undue criticism of any shortcomings which may exist in it from adding to this gratitude which he shares with all mankind.

WILLIAM I. HULL.

The New Peace Movement. By Dr. William I. Hull. Boston. The World Peace Foundation. 1912. pp. ix, 216.

Influences promoting the spread of the international vision are of course rapidly increasing. But Dr. William Isaac Hull, Professor of History at Swarthmore College for nearly a decade, has been recognized as a distinguished factor in the extension of the new statesmanship since the appearance of his important and well-known volume of 1908, a volume entitled, *The Two Hague Conferences and Their Contributions to International Law*.

His recent book *The New Peace Movement* is not a large book, but its chapters treat thoughtfully of the Hague Conferences, especially of the relation of the United States and Latin America to them, of the peril of the new peace movement, of the abolition of trial by battle, of an international grand jury and of an international police. Other chapters are devoted to a discussion of arbitration, the world's two vicious circles, the influence of the peace power upon history, and of religion and the peace power. The professor devotes a chapter to a positive international program and closes his book with a description of the instrumentalities and literature of the modern peace movement.

Prof. Hull recognizes the difficulties in the way of establishing equality of sovereign states in a world organization, but he sees a possible solution in the Connecticut compromises of our own Constitution.

The author believes in the "golden scales of justice" and in an inter-

national sovereignty which shall yet preside effectively over an "ideal international grand jury." It is pointed out that our present armies and navies constitute in no sense an international police, but that a true international police may yet be developed.

Interesting and valuable data covering the facts of the new peace movement, the congresses, associations, and persons conspicuously identified with it, are given clearly, accurately and in considerable detail. The work of the various peace agencies, notably of the American Peace Society, while generously covered and appreciated by the author, is not in all cases brought down to date. The book is well indexed.

ARTHUR D. CALL.

Annuaire de l'Union Interparlementaire, 1913. Publié par Chr. L. Lange, Secrétaire général de l'Union. Brussels: Misch & Thron. 1913.

This volume is the third issue of the year book of the Interparliamentary Union. The year book was originated by Secretary General Lange shortly after he succeeded to that post, with a view to bring the members of the Interparliamentary Union and the public generally into a fuller knowledge of the work and the purposes of the Union; it is admirably adapted to this purpose.

The Interparliamentary Union is an organization of groups of members of both houses of the parliaments of the several nations. Membership in the national groups is of course entirely voluntary; but in most of the great nations it includes so large a proportion of the leading statesmen and parliamentarians that it has become in some respects the most important international organization ever created. As one of its most active American members has said, "it was not organized to promote the glory of any one man, or the interests of any one nation. It is a purely altruistic body and for a quarter of a century has been exercising a wholesome influence on the affairs of the world." It was founded in 1889, by Sir William Randal Cremer, who devoted the whole of his noble life to effort and agitation for the promotion of the central principle of international arbitration. Associated with Cremer in founding the Union, was Frédéric Passy of France, who recently died, recognized and honored as the most illustrious exponent of international arbitration since Cremer's day. The Union has held eighteen international conferences, where many movements have started, with the coöperation of well-known parliamentarians from all nations, looking to practical methods for the promotion of international peace and good will. It is

never to be forgotten that the Second Hague Conference was called in 1907, on the initiative of President Roosevelt, who was led to take this step by the appeal of the Interparliamentary Union, which met in the United States in 1904.

The Interparliamentary Union has permanent headquarters at Brussels, where it is collecting an international library, and where the Council, by whom it is governed, holds stated meetings.

National groups of the Union have been organized in twenty-two countries, and they number 3,328 of the members of the Parliaments of these nations.

The influence of the Union has steadily increased from the date of its foundation, and as a point of contact and method of coöperation for and between the leaders of the parliaments of the world, it is a practical instrumentality of tremendous potency.

The skill and ability of Secretary General Lange are well demonstrated in the make-up and content of this *Annuaire*. It opens with a brief history of the Interparliamentary Union, followed by the statutes of the Union, the officials, the annual report of the Secretary General, and a record of the proceedings of the Seventeenth Conference, held at Geneva in 1913.

Part II of the *Annuaire* is a comprehensive collection of current documents bearing upon international life, including a complete record of the conventions of the Second Hague Conference, and the ratifications and adhesions thereto. In this respect it is a useful manual for the desk of any one interested in the subject.

The third issue of the *Annuaire* contains portraits and eulogies of the late Frédéric Passy, by Baron d'Estournelles de Constant, and Auguste Beernaert, long President of the Council of Ministers of Belgium, by A. Houzeau de Lehaie, President of the Belgian Group of the Interparliamentary Union.

S. N. D. NORTH.

Les Lois de la Guerre Continentale. By Lieutenant Robert Jacomet. Preface by M. Louis Renault. Paris: A. Pedone and L. Fournier. 1913. pp. 160.

In one of its concluding clauses, the Hague Convention of 1907 contains the requirement that the signatory parties shall issue such instructions to their respective land forces as will be calculated to bring their internal regulations into harmony with the rules concerning the laws

and customs of war on land which are embodied in that instrument. The work under examination constitutes, in effect, an effort on the part of the Government of the French Republic to provide such a system of rules: it may be conceded at the outset that Lieutenant Jacomet's manual appears to be well calculated to accomplish the purpose for which it was designed: indeed so well has the work been done that the manual would be equally applicable to the needs of any Power which took part in the Convention of 1907 at The Hague, so clearly and lucidly has it been prepared.

Lieutenant Jacomet, whose attainments are indicated by the title of Doctor of Law, begins his work with an enumeration of the international agreements which are now in force in respect to the conduct of the operations of war on land: these undertakings are seven in number and include the Declaration of St. Petersburg of December 11, 1868, forbidding the use of explosive projectiles of the smaller calibres; the Declaration of The Hague of July 29, 1899, forbidding the employment of artillery projectiles having for their sole or chief purpose to disseminate nauseous or asphyxiating gases, and a second declaration of the same date prohibiting the use of bullets which expand or flatten easily in the human body: among later agreements are the Geneva Convention of July 6, 1906 for the amelioration of the condition of the sick and wounded in time of war; the Convention of October 18, 1907 in relation to the opening of hostilities, and the more important convention reached by the conference on the same date in respect to the laws and customs of war on land, together with the final act of October 18, 1907 prescribing the rights and duties of neutral states and individuals during the existence of warfare on land. This undertaking, easily the most important and authoritative utterance in relation to the operations of land warfare, receives, as it should, the constant and attentive consideration of the author, who warns his readers, however, that the entire body of obligatory laws and customs of war is not to be found in the conventions and declarations above enumerated, and gives especial prominence to the requirement of the convention that "in the cases not included in the regulations adopted by the Powers, belligerents and populations remain under the safeguard and dominion of the principles of the law of nations which result from the usages established among civilized states, the laws of humanity and the demands of public conscience."

Lieutenant Jacomet's work takes the form of an orderly and systematic arrangement of the various authoritative expressions of inter-

national public opinion which have been enumerated and which are recognized as having the force and sanction of international law; to many of these is added a word in the nature of explanatory comment which is calculated to make the requirement clear to the class for which it was primarily intended—the officers and men of the army of the French Republic. The work is well and thoroughly done and bids fair to be of great use—not only to professional soldiers, but to the constantly increasing number of those who are desirous of keeping in touch with the present application of the rules of war to cases arising in the course of military operations or in fields of military occupation to which they properly relate. The world-wide respect with which they are now regarded is indicated by the appeal of the Balkan States to their provisions: and it is a great step forward that communities like these—and some nearer home, have come to acknowledge the existence of a higher law than their own immediate advantage in the prosecution of their ruthless endeavors to inflict punishment for a real or fancied wrong, and to establish their independence of the rule of the Sultan.

Professor Louis Renault, the great French authority on the laws of war, contributes a valuable and interesting preface to Lieutenant Jacomet's manual, in which he asks whether there is in fact a body of obligatory principles that may be fairly entitled to consideration as the laws of continental war. In view of the methods in which war was conducted, so late as the beginning of the nineteenth century, when it will be remembered that Wellington himself was obliged to give over to pillage the defended towns which were captured by the allied forces in the course of the Peninsular War, one is warranted in doubting whether such rules do actually exist. But one who has followed in some detail the operations of the Russo-Japanese War finds abundant occasion for congratulation in the scrupulous observance of those rules by the armies of both Powers, in spite of almost insurmountable difficulties, in the war which was happily closed by the Treaty of Portsmouth. Indeed, progress in the laws of war, as in other branches of humanitarian endeavor, has been very rapid since the middle of the last century, especially in the great conflicts to which France has been a belligerent party; in these operations the broad and sure foundations were laid for the present conventional systems of regulation, which have behind them the firm support of treaty stipulations and the abiding sanction of international public opinion,—a force but little reckoned with by the belligerent Powers of a century ago. True there have been many sad lapses from

grace for, as the professor truly says, "civilized man easily becomes barbarous, and crowds but too easily become criminal."

Professor Renault traces the history and development of the modern rules of war in an essay which is worthy of the attention of all those who are interested in the operation of those rules and the evolutionary progress of usages which have done so much to deprive war of its horrors, to restrict its burdens to the belligerent states and to afford occasion for the display of the virtues of humanity and charity in behalf of those who are called upon to suffer as the result of its operations. The preparation of a similar manual might well engage the attention of the general staff, with a view to make known the military requirements of the several conventions to which the United States is a signatory party. The English War Office has recently issued such a handbook and the lapse of time since the conventions were ratified suggests timely action on the part of the War Department.

GEO. B. DAVIS.

The International Mind. By Dr. Nicholas Murray Butler. New York: Charles Scribner's Sons. 1913. pp. 121.

In this volume the author has brought together five powerful addresses delivered by him as chairman of the Lake Mohonk Conferences on International Arbitration for the years 1907, 1909, 1910, 1911 and 1912. While these lack the coherence of a single work, the book fulfills to a marked degree the author's desire that it may contribute to a public opinion that shall make possible an independent world judiciary, whose decrees "would be enforced by the moral power of the civilized nations of the earth," through the growth of an "international mind" which "is nothing else than that habit of thinking of foreign relations and business, and that habit of dealing with them, which regard the several nations of the civilized world as friendly and co-operating equals in aiding the progress of civilization, in developing commerce and industry, and in spreading enlightenment and culture throughout the world."

The volume is of scarcely less interest as a running commentary on recent events affecting world peace. It analyses the modern peace movement, particularly in America, suggests a practical program, and answers, one by one, the chief arguments which are commonly advanced in opposition. With the naval rivalry between England and Germany as a text, the question of armaments is dealt with at considerable length, and a clear distinction is drawn between disarmament and limitation of

armaments. The Second Hague Conference and the Interparliamentary Union are discussed, and one chapter describes the organization and plans of the Carnegie Endowment for International Peace. The opposition to the Taft treaties of 1911 with Great Britain and France is roundly criticized, as is the self-seeking element that profits or tries to profit from war or war preparations, while selfish political agitation and false patriotism are exposed by comparison with the spirit represented by the "international mind," for which the closing chapter is a powerful appeal directed particularly to Americans who "need the international mind as much as any people ever needed it," although the author looks to the "sober reason" of the American people eventually to give the United States a leading place in the work against war.

Indicating as it does the workings of a highly trained and scholarly mind during a period of striking anomalies in international relations, the book will also perform a real service through its advocacy of a practical plan of action for all persons, especially Americans, interested in diminishing the ravages of war. Although himself an earnest peace advocate, the author is careful to point out that "we must avoid encumbering our program with non-essentials and we must not fail to observe a due sense of proportion in what we recommend. * * * If justice is established between nations, peace will follow as a matter of course. * * * Disarmament will follow peace as an effect, not precede it as a cause."

The style is especially clear and vigorous and the work abounds in striking passages which make it highly readable and valuable alike to the student of world problems and to the average reader desiring a better insight into the underlying motives and the true significance of the international peace movement.

H. C. PHILLIPS.

The Progress of Japan 1853-1871. By J. H. Gubbins. C. M. G. Oxford: Clarendon Press. 1911. pp. 323.

To the western mind, the change of thought that has swept over Japan since Commodore Perry with four warships anchored in Uraga harbor on July 8, 1853, is inexplicable. Mr. Gubbins has, however, with great skill and intelligence, undertaken to show the nature of the change up to 1871. That its full significance may be understood he has, at the outset, portrayed with care the conditions existing in Japan when the first treaty was negotiated. Perry's negotiations are then described at length. Notwithstanding the limited scope of the treaty of 1854 that is associated

with his name, the Commodore is regarded as deserving the praise bestowed upon him for his "firmness, patience and tact." The author adverts to the fact that the British convention of 1854 recorded the general right of ships of war, as distinct from merchant vessels, to enter ports of friendly Powers, with the proviso that the right should not be exercised in Japanese waters without necessity or proper explanation. It is noted that within five years of Perry's arrival, notwithstanding their dislike to foreign intercourse, the Japanese entered into no less than thirteen elaborate agreements with foreign states.

The history of internal affairs from 1853 to 1860, and again from 1860 to 1863, is observed with special reference to the relation thereof to the outside world. The author declares that the elimination of the sovereign from all active share in the work of government through the usurpation of imperial authority by representatives of great houses, began as early as the seventh century, and that for more than two hundred years before Perry's visit the control of those agencies capable of dealing with the outside world were in the practical possession of the Shōgunate. The hostility, therefore, of the Court at Kiōto to everything foreign, and the opposing attitude of the Shōgunate at Yedo are carefully narrated.

At a time when a certain Power is demanding the rigid observance of the terms of its treaty of peace and commerce with the United States, it is comforting to note that in 1862, the Yedo Government, on account of the determined hostility of the Court and conservative party to foreign interests, appealed to the treaty Powers not to abrogate existing treaties, but to postpone for a few years the operation of certain provisions. Attention is especially called to the protocol of June 6, 1862 with England, in which it was declared that the postponement was needed "in consequence of the opposition offered by a party in Japan which is hostile to all intercourse with foreigners." The incessant opposition of the Court to foreigners, its insistent demand for their expulsion years after the conclusion of treaties with several states, the formal declaration in behalf of the Court to the foreign ministers, announcing the decision of the government to close the country again to foreigners, the firing of the forts at Shimonoséki on an American vessel, the subsequent destruction of the batteries by an expedition of the Powers, and the exaction of an indemnity expressed in the Shimonoséki Convention of October, 1864, were the natural consequences of Japan's long isolation. They serve to render all the more impressive the change of attitude that quickly followed. In 1865 the Emperor, doubtless as a consequence of a powerful naval

demonstration, granted formal approval of the group of treaties that had succeeded the earliest conventions.

Mr. Gubbins has portrayed well events that led up to the fall of the Shōgunate—the resignation of the Shōgun in 1867, the recovery by the Court of powers it had not wielded for centuries, the wonderful insight of the Shōgun in perceiving that the restoration of administrative authority to the Court might unify the empire and enable the country to "hold its own with all nations of the world," the assumption of full control by the Emperor, and the use of force necessary to overcome the resistance of the sympathizers with the ex-Shōgun. Then follows an interesting chapter on the abolition of feudalism, which culminated in the surrender of fiefs to the Crown by the feudal nobility. One is impressed by the spirit of patriotism that inspired the Memorial of Daimiōs who surrendered their fiefs in 1869. Whether it was a wave of imperialism or an intense love of country that led to the sacrifice is unimportant. The significant fact is that the Emperor suddenly found himself free from another burden that thwarted imperial control and checked the economic progress of the state.

Mr. Gubbins proceeds to show how the Imperial Government suddenly, as a consequence of changed conditions, recognized that foreign intercourse was essential to the country, and was entitled to the formal sanction of the Crown. How wisely the Emperor appreciated the situation, and how justly he sought the benefits of such intercourse in the years that followed, Mr. Gubbins has not undertaken to narrate; for his book does not treat of events after 1871. He leaves Japan at the parting of the ways. His description of the preceding eighteen years and his comments respecting their significance are of great merit.

The value of the book is increased by the appendixes containing the texts of the earlier treaties and conventions, as well as of numerous other important documents. A glossary is added.

CHARLES CHENEY HYDE.

Some Roads Towards Peace. Report on observations made in the Far East in 1912. By Dr. Charles W. Eliot. Washington: Carnegie Endowment for International Peace. 1913.

The Carnegie Endowment for International Peace has just published, for public distribution, the Report of Dr. Charles W. Eliot, President *Emeritus* of Harvard University, describing his experiences and impressions on the trip to the Far East which he made in 1912 under the aus-

pices of the Endowment in pursuance of its plan for international visits of representative men, with a view of acquainting the peoples of the various nations more fully with the history, institutions and ideals of other nations. Dr. Eliot was the first American chosen to make such a visit; and his report is one of the most interesting, penetrating and suggestive publications that has ever been made upon the internal conditions in the two great nations of China and Japan,—one of them absorbingly interesting at the moment to students of political science everywhere, because of the recent revolution there. Dr. Eliot was in China at a very critical period in the establishment of the republic. He describes with dramatic detail the extraordinary difficulties with which the young statesmen have to contend, and with many of whom he came into intimate contact while at the Chinese capital, and a large proportion of whom were educated in American universities, and are striving to put into effect in China the ideals of democratic institutions which they acquired by contact with the American people. They have a Herculean task before them; they are confronted by incredible problems, such as never before confronted a nation. For Dr. Eliot makes it plain that the Manchu government was a sham. It turned over to the republic "no government organization in the modern sense, no national revenues, no trustworthy army, no efficient navy, no roads, no schools, no system of taxation, no national police, no courts or body of laws in the Western sense, no public health service";—nothing, in fact, but numerous embarrassing concessions to foreign countries and corporations, and many crippling treaties which pawn the national resources.

One of the chief difficulties which the Chinese statesmen encounter in the organization of the new republic arises from the lack of trained natives, competent to administer the public offices, and a distrust of experts named by foreign governments for such service. Too often in the past, it appears, these foreign experts have served the nation which named them rather than the country which paid them. One direct result of Dr. Eliot's visit to China is particularly interesting. The government was about to prepare a permanent constitution, and was confronted by the difficulty above referred to. Dr. Eliot ventured to suggest that the Carnegie Endowment might be able to help them to obtain an expert adviser on this delicate and important matter. Shortly after his return to America, the Chinese Government asked the Endowment to nominate an adviser, which it did in the person of Professor Frank J. Goodnow, Eaton Professor of Public Law and Munie-

ipal Science in Columbia University, who is now in China, under a three years' contract, and rendering most satisfactory service.

Another great handicap, Dr. Eliot points out, is the absence of any knowledge of modern medicine. Hospitals are practically unknown, and epidemics are frequent and terrible. Until some system of public education has been put into force, and several generations have passed, the outlook for China is distinctly discouraging, although not without hope; because the people as a mass are patient, industrious and peaceably minded. "The Western world," writes Dr. Eliot, "ought to stand by China with patience, forbearance and hope while she struggles with her tremendous social, industrial and political problems!"

Journeying over to Japan, Dr. Eliot found himself in surroundings which present the most remarkable contrast. He vividly describes the successful grafting of Occidental institutions, methods, and ideas upon this Oriental people, and the transformation which half a century has worked upon a civilization thousands of years old. Indeed, it is the success of Western ideals in Japan, which gives the greatest hope to the Chinese patriots, who cling to the conviction that what has been done in one Oriental country can be done in another,—so like it in many particulars.

Of vital interest, because of his intimate and confidential intercourse with Japanese statesmen and publicists, is Dr. Eliot's view of the future relations of Japan and the United States. Japan has no thought to "dominate the Pacific," as is often asserted by Occidental army and navy men. Her statesmen recognize the practical impossibility of a successful military expedition by Japan against the United States, or of the United States against Japan, under the conditions of modern warfare. Dr. Eliot declares it to have been the opinion of every Japanese statesman and man of business with whom he talked that there is no interest of Japan which could possibly be promoted by war with the United States or any other nation; and conversely, there is no interest of the United States which could possibly be promoted by war with Japan. "War between the two countries is not to be thought of; and to suppose that Japan would commit an act of aggression against the United States, which would necessarily cause war, is wholly unreasonable, fantastic, and foolish,—the product of morbid and timorous imagination."

Dr. Eliot concludes his Report with certain inferences to be drawn from his experiences and observations, indicating lines of action for the Endowment which may be profitably pursued for the promotion of

international peace, through its Division of Intercourse and Education, of which President Nicholas Murray Butler of Columbia University, is the Acting Director. He suggests the creation or support of agencies competent to reduce, relieve or prevent the wrongs, miseries and illusions which have caused and are still causing wars; the strengthening of public opinion in favor of publicity in governmental and commercial transactions; the probing of all secracies and hidings in the family, in industries, in legislation and administration; the cultivation among all nations of trusteeship, public spirit, and the application of private money to public uses; the founding or fostering, in addition to universal elementary education, of permanent educational agencies, such as libraries, hospitals, dispensaries, training schools for nurses, and technical and professional schools in countries which lack these instrumentalities: the frank recognition of the present necessity of maintaining in all countries armed forces for protective duty against aggression from without, or disintegration from within; the strengthening of international public opinion in favor of an international naval force to secure peace and order on the seas, and a freedom for water-borne commerce that cannot be interrupted; and finally, the fostering of those religious sentiments and those economic, industrial, and political principles which manifestly tend to purify and strengthen family life, and to secure liberty, domestic joys, public tranquillity, and the people's health, morality and general well being.

There is not a dull page in Dr. Eliot's Report. Every topic is treated in the broad, philosophical spirit which pervades all his writings, and the style is always scholarly and trenchant. So intense is interest in these two nations throughout the United States, that Dr. Eliot's Report is certain to have a wide reading, as the last and most illuminating word on the Far East. It will be distributed free by the Carnegie Endowment, upon application to the Secretary, 2 Jackson Place, Washington, D. C.

N. D. NORTH.

La Enseñanza del Derecho Internacional Pùblico. By Dr. Manuel Arbeilaiz. Montevideo: Escuela Nacional de Artes y Oficios. 1909. pp. 108.

This little work, true to its title, is a treatise on the art of teaching international law. The first thirty-five pages are devoted to a presentation of the "program" submitted by the author, consisting simply of a series of headings and subheadings amplified in each case by a

group of questions calling for individual discussion in connection with each subdivision. This digest of subjects is followed by a second chapter or subdivision of the book, the subject of which still continues to be the "program," constituting in effect a dissertation thereon supporting the presentation already made. This is followed by a short sketch of the origin and development of international law, "the younger son in the family of Laws, and for this reason its weakest member." This chapter being necessarily and properly limited to the requirements of the work itself, affords no opportunity for the presentation of any new conception arising in connection with the general subject. The author, however, refers in an interesting and readable manner to the vexed questions of sanction, and of the effect of the development and recognition of existing rules of the law of nations upon warfare as a mode of deciding international disputes. The author points out that "war is an exemplification of the limitations of human nature the attainment of the state of perfection by which does not depend upon adherence to legal principles; but that to attain this end is the constant and interminable task imposed upon all the physical and moral factors of humanity in their endless march through time and space." He further points out the error of conceding that any system of law necessarily must have recourse to force for the purpose of bringing about obedience to its principles either by individuals or by nations, and supports his contention by examples taken from the Roman law as well as codes of later origin.

The book ends with a short sketch of the author's ideas of the methods to be employed in teaching the law of nations, followed by suggestions as to text books to be used for this purpose.

C. L. BOUVÉ.

Programa de Derecho Diplomático and *Programa de Derecho Internacional y Legislación Consular*. By Dr. José León Suárez, Professor in the National University of Buenos Ayres. Official Edition. Buenos Ayres. 1913.

The above are the new plans of study adopted by the Faculty of Law and Social Science and the Superior Institute of Commercial Studies of the National University of Buenos Ayres for the teaching of diplomatic and international law and consular legislation, prepared by the distinguished professor, Dr. José León Suárez. They mark a new step toward the diffusion of these sciences in our sister republics of South America, where, as we understand it, they are, for the first time, taught

in any university. The fact is important, in the progress and development of international law and relations, and Dr. Suarez assuredly deserves much credit for the preparation of these courses, which are as complete in their scope as could be desired.

Dr. Suarez was one of the delegates of the Argentine Republic to the International Conference of Veterinary Police, held at Montevideo, in May, 1912, by the Argentine Republic, Brazil, Chile, Paraguay, and Uruguay.

PEDRO CAPÓ RODRÍGUEZ.

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